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## Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court

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# Washington University Law Review

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VOLUME 85

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## BELOW THE SURFACE: COMPARING LEGISLATIVE HISTORY USAGE BY THE HOUSE OF LORDS AND THE SUPREME COURT

JAMES J. BRUDNEY\*

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## INTRODUCTION

[L]aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends. The difficulty is that the legislative ideas which laws embody are both explicit and immanent. And so the bottom problem is: What is below the surface of the words and yet fairly a part of them?<sup>1</sup>

Our legal community is not alone in debating the use of legislative history as a resource for the interpretation of statutes. In 1992, the House of Lords in *Pepper v. Hart*<sup>2</sup> overruled more than two centuries of precedent when it decided that courts could refer to and rely on Hansard—the official record of standing committee proceedings and parliamentary debates<sup>3</sup>—to aid in construing enacted laws. The ensuing period has witnessed intense disagreements over the scope and propriety of *Pepper*. As is true in the United States, the British debate has occurred among legal scholars<sup>4</sup> as well as judges, and the judicial exchanges have taken place both in academic settings<sup>5</sup> and through pronouncements from the bench.<sup>6</sup>

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1. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947).

2. *Pepper v. Hart*, [1993] 1 All E.R. 42 (H.L. 1992) (U.K.).

3. The official verbatim report of U.K. parliamentary proceedings takes its name from the Hansard family. Luke Hansard was the printer of the *Journals of the House of Commons* from 1774 to 1828; his sons and grandsons succeeded him in the business. The government took over the reporting function in 1908; the name Hansard was restored to the title page in 1943. See DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 553 (1980).

4. Compare J. H. Baker, *Case and Comment: Statutory Interpretation and Parliamentary Intention*, 52 C.L.J. 353 (1993) (criticizing *Pepper*), and Scott C. Styles, *The Rule of Parliament: Statutory Interpretation After Pepper v. Hart*, 14 O.J.L.S. 151 (1994) (same), with Stefan Vogenauer, *A Retreat from Pepper v. Hart?: A Reply to Lord Steyn*, 25 O.J.L.S. 629 (2005) (defending the decision).

5. Compare Lord Johan Steyn, *Pepper v. Hart: A Re-examination*, 21 O.J.L.S. 59 (2001)

The judicial arm of the House of Lords—known as the Law Lords<sup>7</sup>—has opened the door to the use of legislative history at a time when the United States Supreme Court has been clamping down on such usage.<sup>8</sup> Accordingly, one might wonder if the British and American judicial systems are in the process of trading places on this interpretive issue. In fact, citation to *Hansard* by the Law Lords in the past decade does not approach the levels of reliance on legislative history practiced by the Supreme Court. Notwithstanding the appreciable influence of Justice Scalia, Supreme Court Justices continue to make use of legislative history in their opinions between three and five times more often than their counterparts in Britain.<sup>9</sup>

On the other hand, despite a spirited reaction to *Pepper* by several members of the Law Lords,<sup>10</sup> references to *Hansard* have been increasing in the years since 2000. Moreover, the great majority of judges serving on

(criticizing *Pepper*), and Lord Millett, *Construing Statutes*, 20 STATUTE L. REV. 107 (1999) (same), with Lord Hoffmann, *The Intolerable Wrestle with Words and Meanings*, 114 S. AFR. L.J. 656, 669 (1997) (justifying the decision in part).

6. Compare, e.g., *Jackson v. Att’y Gen.* [2005] UKHL 56, [2005] 4 All E.R. 1253, 1285 (U.K.) (Steyn, L.J.) (criticizing and declining to rely on *Pepper*), and *Robinson v. Sec’y of State* [2002] UKHL 32, [2002] N. Ir. L.R. 390, 400, 404–05, 413, 420 (U.K.) (Bingham, Hoffmann, Hobhouse & Millett, L.J.J.) (same), with *Harding v. Wealands* [2006] UKHL 32, [2006] 4 All E.R. 1, 12–13, 23, 25–26 (U.K.) (Hoffmann, Rodger & Carswell, L.J.J.) (defending and relying on *Pepper*), and *Jackson*, [2005] 4 All E.R. at 1276–77 (Nicholls, L.J.) (same), and *Mirvahedy v. Henley* [2003] UKHL 16, [2003] 2 All E.R. 401, 438 (U.K.) (Walker, L.J.) (invoking and placing some reliance on *Pepper*).

7. The House of Lords as a court consists of twelve Lords of Appeal in Ordinary and, until very recently, the Lord Chancellor. See Administration of Justice Act, 1968, c.5 § 1(1)(a) (U.K.), amended by Maximum Number of Judges Order 1994 S.I. 1994/3217 ¶ 2 (U.K.). See generally GLENN DYMOND, THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS, H.L. Library Note No. 2006/002, at 10–14 (2006), <http://www.parliament.uk/documents/upload/HLLAppellate.pdf>. The Lords of Appeal in Ordinary—usually referred to as the Law Lords—are appointed by the Queen upon recommendation from the Prime Minister; such recommendation, in turn, was until 2005 based on advice from the Lord Chancellor. The Law Lords, who are made life peers, review appeals in panels that typically consist of five members but may be as few as three; in relatively rare cases, there may be as many as seven or even nine members if the issues presented are viewed as especially difficult or important. See TERENCE INGMAN, THE ENGLISH LEGAL PROCESS 4–8 (11th ed. 2006); MICHAEL ZANDER, THE LAW-MAKING PROCESS 339–42 (William Twining & Christopher McCrudden eds., 6th ed. 2004). Under the Constitutional Reform Act of 2005, the Lord Chancellor continues to play an administrative role in the justice system, but he no longer serves as a judge, and his responsibility for judicial appointments has been shifted to a new Judicial Appointments Commission. See OONAGH GAY, PARLIAMENT AND CONSTITUTION CENTER, THE CONSTITUTIONAL REFORM ACT 2005—THE ROLE OF THE LORD CHANCELLOR, H.C. Library Standard Note PC/3792, at 3–5 (2005), <http://www.parliament.uk/commons/lib/research/notes/snpc-03792.pdf>.

8. See, e.g., James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 222–24 (2006); Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique*, 36 HARV. J. ON LEGIS. 369, 384–87 (1999).

9. See *infra* Part II.A.

10. See *infra* Part I.C.

Britain's highest court over the past decade have invoked legislative history materials in their opinions, many on a repeated basis.<sup>11</sup> Thus, even if the Law Lords are unlikely to value legislative history to the same extent as does the Supreme Court, a new era of reliance on that history has been launched, and the debate among British judges is instructive from a comparative standpoint.

This Article offers the first empirical examination of how often, and in what ways, Britain's highest court has used previously excluded legislative history materials in its judicial decisions. It also represents the first effort to compare legislative history treatment between the Law Lords and the Supreme Court. The Article's comparative inquiry identifies differences in the frequency with which legislative history is invoked in each Court's decisions and offers explanations for the distinct patterns of usage that have emerged.

Several key differences in national lawmaking structures and processes help account for why legislative history usage remains substantially greater in the Supreme Court than in the Law Lords.<sup>12</sup> For a start, the committee report—a primary source of reliable legislative history in the American context—is essentially absent from the British setting, where parliamentary standing committees play only a peripheral role in creating and explaining bill language. Further, negotiation and compromise following bill introduction are normal features of Congress's decentralized and discontinuous decision making but are exceptional occurrences under the more efficient methods by which bills are enacted in Parliament. Because legislative history in the United States typically addresses the meaning of text that has been modified if not recast during the lawmaking process, the Supreme Court often refers to that history to help understand legislative bargains. Conversely, because legislative compromise is rarely required under Britain's party-controlled parliamentary regime, there is less need to refer to Hansard to explain text that remains substantially unaltered since its introduction. Finally, parliamentary materials approved for citation under the rule of *Pepper* consist almost exclusively of statements by government ministers.<sup>13</sup> By contrast, our legislative history includes a richer and more diverse set of materials, generated at different

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11. See *infra* Part II.A.

12. See *infra* Part II.C.

13. See *Pepper v. Hart*, [1993] 1 All E.R. 42, 64, 69 (H.L. 1992) (U.K.) (Browne-Wilkinson, L.J.).

stages by Congress and its committees, with executive branch representatives cast in supporting roles at Congress's invitation.<sup>14</sup>

Still, even though there are institutional reasons to anticipate less frequent use of legislative history by the Law Lords than by the Supreme Court, the British innovation of invoking Hansard as an interpretive aid is alive and well after fifteen years. The Law Lords have recently indicated that parliamentary materials may be used under conditions broader than those set forth in *Pepper*, and Hansard is admissible based on much the same intentionalist and purposive justifications as the Supreme Court has applied when valuing legislative history in statutory construction. Although it remains early in the Law Lords' venture with this new interpretive asset, the Article predicts that reliance on Hansard will continue and may even increase in the future. The Article then uses comparative analysis to offer preliminary thoughts as to how each country's highest court might learn from the other's approach to legislative history usage.

Since *Pepper*, the Law Lords have framed their disagreements over legislative history in less polarized terms than have been applied in the United States. British judges have tended to argue over when and to what extent Hansard is probative in assisting courts to interpret Parliament's laws, whereas the current contest on the Supreme Court has been about whether legislative history should be admissible in court at all.<sup>15</sup> Our judicial conversations could profit from Britain's more textured approach.

At the same time, legislative history applications adopted by the Law Lords have involved a shifting series of aspirationally objective rules. The search for bright-line answers may reflect an understandable judicial impulse to direct and confine the use of this new and potentially open-ended interpretive resource. Yet the Supreme Court's relatively ad hoc method of applying legislative history, although messier in conceptual

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14. Recent controversy over the proliferation of signing statements by President Bush reflects the novelty of unilateral forays into bill interpretation by the executive branch—forays that would be far less controversial in a system dominated by executive branch commentary. See AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, REPORT AND RECOMMENDATIONS 20, 26 (2006), <http://www.abanet.org/op/signingstatements> (click on "Task Force Report with Recommendations") [hereinafter ABA TASK FORCE REPORT] (urging that Presidents cease using signing statements to state an intention to interpret or enforce a law in a manner inconsistent with the will of Congress, and observing that most courts give little or no weight to signing statements as "legislative history"); *Presidential Signing Statements: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2006), available at <http://judiciary.senate.gov/hearing.cfm?id=1969> [hereinafter *S. Judiciary Comm. Hearing*] (statements by Sen. Specter (Chair) and Sen. Leahy (ranking member)) (critical of President Bush's unprecedented use of signing statements).

15. See generally John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33 (2006).

terms, arguably does a better job of promoting flexibility in the interpretive enterprise. Such flexibility should become more valued by Britain's judiciary as it gains experience in reviewing and assessing parliamentary materials.

Part I of the Article presents recent developments in Britain, including the basic rule of *Pepper v. Hart* and some key modifications or refinements of the rule announced in subsequent decisions. Part II begins with a quantitative comparison between the Law Lords' invocation of Hansard since 1996 and the Supreme Court's use of legislative history during the same time period. Part II then considers whether there are sound reasons for British courts to rely less on legislative history than do American courts. The comparison focuses on the nature of the legislative process in the two countries and on separation of powers issues, including the risks of opportunistic behavior by creators of legislative history. Part III examines certain elements of the current debate among British judges, using these elements to anticipate future uses of Hansard by the Law Lords. Part III also identifies differences between the British and American approaches that may be instructive for the Supreme Court in one respect and for the Law Lords in another.

#### I. CHANGES WROUGHT BY *PEPPER V. HART*

In the United States, federal courts began relying on legislative history to construe statutes in the latter part of the nineteenth century.<sup>16</sup> The Supreme Court's robust appetite for this interpretive resource dates primarily from the period after 1940, but judicial reliance increased gradually during much of the twentieth century.<sup>17</sup> The absence of a single moment of self-conscious change by American courts contrasts notably with British experience. *Pepper v. Hart* was a watershed decision in constitutional as well as practical terms, and the Law Lords have revisited the ruling and its effects in remarkably frank terms. After fifteen years of soul-searching and some second thoughts, Britain's highest court seems unlikely to backtrack on its commitment to the utility of legislative history as an interpretive resource.

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16. For a major decision inaugurating modern practice, see *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 464–65 (1892). For isolated earlier examples, see *Blake v. Nat'l Banks*, 90 U.S. 307, 319–20 (1874), and *Jennison v. Kirk*, 98 U.S. 453, 459–60 (1878).

17. See *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543–49 (1940); William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 392 (1990); Frankfurter, *supra* note 1, at 543.

### A. *The Law Before Pepper*

As far back as 1769, British courts refused to consider parliamentary proceedings as an aid to statutory construction.<sup>18</sup> By the mid-nineteenth century, courts had extended the exclusionary rule to bar examination of pre-legislative preparatory materials, such as reports authored by government-appointed commissioners that often formed the basis for the statute under review.<sup>19</sup> The courts relaxed this harsher approach around 1900, allowing judges to refer in their opinions to commission reports and White Papers<sup>20</sup> for the purpose of determining the “mischief” a statute was intended to address, although *not* for the purpose of construing the words chosen by Parliament to address that mischief.<sup>21</sup> Still, as late as 1980, it was technically prohibited for parties to cite in court anything said in the House of Commons without first obtaining consent from the House.<sup>22</sup>

The justifications offered for excluding all references to parliamentary proceedings have been both constitutional and pragmatic. From a constitutional standpoint, Article 9 of the English Bill of Rights safeguards the freedom of parliamentary debates and proceedings against impeachment or questioning in the courts or any locations other than Parliament.<sup>23</sup> Some judges and scholars concluded that this provision does more than simply protect the freedom of parliamentary debate; it also immunizes the debates and proceedings as a whole. They maintained that to review or analyze in court what is said by a bill sponsor or government minister in committee or on the floor of Parliament is to violate Article

18. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 217 (K.B.) (Willes, J.); *see Pepper*, [1993] 1 All E.R. at 60–61 (Browne-Wilkinson, L.J.).

19. *Salkeld v. Johnson*, (1848) 154 Eng. Rep. 487, 495 (Exch. Div.); *see also Pepper*, [1993] 1 All E.R. at 61 (Browne-Wilkinson, L.J.).

20. White Papers (printed on white paper) announce reasonably firm government policy on a particular issue and precede the introduction of a bill. In the words of former Prime Minister Harold Wilson: “A White Paper is essentially a statement of [g]overnment policy, in such terms that a withdrawal or major amendment, following consultations or public debate, tends to be regarded as a humiliating withdrawal.” HAROLD WILSON, *THE LABOUR GOVERNMENT 1964–70: A PERSONAL RECORD* 380 (1971). By contrast, Green Papers announce more tentative government proposals, ready for public discussion but with the government remaining uncommitted. *Id.* *See generally* GARY SLAPPER & DAVID KELLY, *THE ENGLISH LEGAL SYSTEM* 59–60 (8th ed. 2006).

21. *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs and Trademarks*, [1898] A.C. 571, 575–76 (H.L. 1898) (U.K.) (Earl of Halsbury, L.C.); *see also Pepper*, [1993] 1 All E.R. at 61 (Browne-Wilkinson, L.J.).

22. David Miers, *Citing Hansard as an Aid to Interpretation*, 4 *STATUTE L. REV.* 98, 99 (1983); *see also ZANDER, supra* note 7, at 161.

23. 1 W. & M., c.36 § 1(9) (1689). Article 9 states Parliament’s resolution “[t]hat the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.” *Id.*



9.<sup>24</sup> A second constitutional justification, based on separation of powers, was that allowing floor statements by individual legislators to shed light on the intent or effect of a law would confuse the distinct roles of Parliament as sovereign in the making of laws and courts as sovereign in their interpretation.<sup>25</sup>

The earliest judicial explanation for refusing to admit parliamentary materials, however, was practical rather than constitutional: House of Commons debates were not fully or accurately reported.<sup>26</sup> Even after 1909, when Hansard's *Parliamentary Debates* offered an authoritative and comprehensive report of proceedings,<sup>27</sup> the time and expense involved in reading all potentially relevant debates, and the special burden such an endeavor would impose on parties with lesser resources, were still regarded as serious obstacles.<sup>28</sup> In 1969, when the Law Commissions of England and Scotland presented their comprehensive report on statutory interpretation, the commissioners recognized that Hansard was sufficiently relevant to the interpretative task of courts to warrant consideration.<sup>29</sup> Nonetheless, the commissioners recommended that the exclusionary rule be retained largely for practical reasons. They pointed to the difficulty of isolating the truly valuable information found in parliamentary debates and the consequent challenge of providing such information in a convenient and accessible form.<sup>30</sup>

Like many major breaks with legal precedent or tradition, the decision in *Pepper v. Hart* did not simply materialize out of thin air. After the Law Commissions' extended and thoughtful treatment, some appellate judges in the 1970s began voicing doubts as to the ongoing basis for a rigid rule of non-admissibility. A judge in one case advocated reliance on Hansard

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24. See Francis Bennion, *Hansard—Help or Hindrance? A Draftman's View of Pepper v. Hart*, 14 STATUTE L. REV. 149, 152 & n.14 (1993) (citing WILLIAM BLACKSTONE, 1 COMMENTARIES 163 (17th ed. 1830)). Hansard's Official Report includes the edited verbatim proceedings from both houses and their standing committees. See UK Parliament, [www.publications.parliament.uk/pa/pahansard.htm](http://www.publications.parliament.uk/pa/pahansard.htm) (last visited May 15, 2007).

25. See *Pepper v. Hart*, [1993] 1 All E.R. 42, 63–64 (H.L. 1992) (U.K.) (Browne-Wilkinson, L.J.) (reciting argument for exclusion propounded by the government).

26. See *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 217 (Willes, J.) (K.B.) (giving as reason for refusing to consider parliamentary proceedings “[t]hat history [of changes a bill underwent in the house where it was first debated and approved] is not known to the other house, or to the Sovereign”).

27. See Vogenauer, *supra* note 4, at 631; H.C. Info. Office, *Fact Sheet G17: The Official Report*, 2003, at 2–3, <http://www.parliament.uk/documents/upload/g17.pdf>.

28. See *Beswick v. Beswick*, [1968] A.C. 58, 74 (H.L. 1967) (U.K.) (Lord Reid); Bennion, *supra* note 24, at 154.

29. THE LAW COMM'N (NO. 21) AND THE SCOTTISH LAW COMM'N (NO. 11), THE INTERPRETATION OF STATUTES, 1969, 31–32.

30. *Id.* at 36.

for the purpose of identifying the mischief at which a law was aimed.<sup>31</sup> Lord Denning, in the Court of Appeal, went further, citing *Hansard* to help interpret and apply the statutory words under review.<sup>32</sup> In the course of his opinion, Lord Denning lamented that too often judges “grope about in the dark for the meaning of an Act” because they are denied access to what is said in Parliament.<sup>33</sup> He added that “[a]lthough it may shock the purists,” there was nothing to stop judges from consulting the debates on their own and gleaning guidance from them—something he himself “confess[ed]” to having done on numerous occasions.<sup>34</sup> Upon further appeal, the House of Lords disagreed with Lord Denning’s position and re-affirmed the exclusionary rule,<sup>35</sup> but the debate was becoming more open.

In the years immediately preceding *Pepper*, the Law Lords recognized certain limited exceptions to the exclusionary rule. One exception allowed for consideration of a government minister’s policy statement to Parliament explaining how the government proposed to implement its broad statutory authority in a specific setting.<sup>36</sup> The policy statement was deemed relevant in determining whether the minister had unlawfully exceeded his powers under the act in question.<sup>37</sup> Another exception involved interpretation of delegated or secondary legislation—known as statutory instruments—designed to carry out requirements under European Community law.<sup>38</sup> The Law Lords relied on the *Hansard* account of government explanations and member criticisms as an aid to determining Parliament’s intent in approving the regulations,<sup>39</sup> although in doing so they observed that such delegated legislation was not subject to the same parliamentary processes of consideration and amendment that a bill would face.<sup>40</sup>

These fairly modest inroads were followed, in November 1992, by the sea change of *Pepper v. Hart*, holding that reference to *Hansard* would

31. *Race Relations Bd. v. Dockers’ Labour Club & Inst., Ltd.*, [1976] A.C. 285, 299 (H.L. 1974) (U.K.) (Simon, L.J.).

32. *Davis v. Johnson*, [1979] A.C. 264, 276–77 (C.A. 1977) (U.K.) (Denning, L.).

33. *Id.* at 276.

34. *Id.* at 277.

35. *Id.* at 337 (1978) (Viscount Dilhorne), 349–50 (Scarman, L.); *see also* S.G.G. EDGAR, *CRAIES ON STATUTE LAW* 128–29 (7th ed. 1971) (summarizing traditional position of excluding debates in Parliament).

36. *See Brind v. Sec’y of State for the Home Dept.*, [1991] 1 All E.R. 720 (H.L. 1991) (U.K.). The decision addressed the government’s policy directing broadcast media to ban television or radio appearances by persons representing certain proscribed terrorist organizations.

37. *See id.* at 723–24 (Bridge, L.J.), 729–30 (Ackner, L.J.).

38. *See Pickstone v. Freemans*, [1988] 2 All E.R. 803 (H.L. 1988) (U.K.).

39. *See id.* at 806–07 (Keith, L.J.), 814–15 (Templeman, L.J.).

40. *See id.* at 807 (Keith, L.J.), 814 (Templeman, L.J.).

henceforth be permitted as an aid to the interpretation of primary legislation. In reaching its six-to-one majority decision, the Law Lords disavowed contrary holdings and rationales from a number of earlier decisions.<sup>41</sup>

### B. *The Rule of Pepper*

*Pepper v. Hart* involved a tax statute; the controversy arose over how to measure the taxable fringe benefit received by nine members of the teaching staff at an independent boys' school.<sup>42</sup> Pursuant to a concessionary fee scheme operated by the school, the teachers' sons were educated at a charge of one-fifth the fees paid by members of the public. The school was not filled to capacity, and its marginal costs in educating these additional boys were very low—minimal amounts for food, laundry, school supplies, etc.<sup>43</sup> The boys' parents argued that they owed no taxes at all, because the value of the fringe benefit they received was less than the one-fifth fees they had paid. The Crown, on behalf of the Inspector of Taxes, maintained that the expense incurred by the school was simply the average cost of its providing for the education of all enrolled children; this average cost well exceeded the one-fifth fees paid by the nine members of the teaching staff, and thus taxes were owed on the difference.<sup>44</sup>

The Finance Act of 1976 provides that the proper measure of a taxable benefit is the "cash equivalent of the benefit."<sup>45</sup> Another section of the Act defines that phrase as "an amount equal to the cost of the benefit," but further textual references to "cost of the benefit" might plausibly be viewed as meaning either an employer's marginal cost or its average cost.<sup>46</sup> At the conclusion of oral argument, the Law Lords determined by a four-to-one margin that the text should be construed in favor of the

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41. See *Pepper v. Hart*, [1993] 1 All E.R. 42, 60–69 (H.L. 1992) (U.K.) (abandoning the rule set forth in *Beswick v. Beswick*, [1968] A.C. 58 (H.L. 1967); *Black-Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenberg AG*, [1975] 1 All E.R. 810 (H.L. 1975); *Davis v. Johnson*, [1979] A.C. 317 (H.L. 1978); and *Fothergill v. Monarch Airlines Ltd.*, [1980] 2 All E.R. 696 (H.L. 1980)).

42. See *id.* at 42.

43. See *id.* at 54.

44. See *id.*

45. Finance Act, 1976, c. 40, § 61(1) (U.K.).

46. Section 63(1) defines "cash equivalent of any benefit chargeable to tax under section 61" as "an amount *equal to the cost of the benefit*," *id.* § 63(1) (emphasis added), arguably suggesting that the referenced cost is the marginal cost to the employer of providing the benefit. Section 63(2) adds that "the cost of a benefit . . . includes a *proper proportion of any expense* relating partly to the benefit and partly to other matters," *id.* § 63(2) (emphasis added), suggesting perhaps more strongly the average cost to the employer of educating each child under its supervision.

government.<sup>47</sup> They reasoned that the “cost of the benefit”—in traditional accountancy terms and as a matter of ordinary meaning—was properly understood in this setting to signify the average cost of providing the same educational benefit to all boys in the school.<sup>48</sup>

Before the decision issued, however, the Law Lords became aware that in the course of debate on the passage of the 1976 Act, the Financial Secretary to the Treasury had responded to questions in the House of Commons on virtually the precise circumstances presented in the pending appeal.<sup>49</sup> The Law Lords then held a second hearing before an enlarged panel of seven judges, addressed to the question of whether it was appropriate for the Court to depart from the exclusionary rule, and if so whether *Hansard* provided any guidance in deciding the instant case.<sup>50</sup> The Court answered yes on both counts.

Lord Browne-Wilkinson authored the leading speech.<sup>51</sup> His primary reason for modifying the exclusionary rule was that allowing the Court to evaluate *Hansard* materials would further the Court’s “duty . . . to give effect to the intention of Parliament.”<sup>52</sup> Recognizing that ambiguities in enacted text were inevitable, Lord Browne-Wilkinson noted that in many if not most cases, the parliamentary materials would shed no light on the interpretive matter facing the Court. But in those few instances where statements made during debates would provide “a clear indication of what Parliament intended in using those words,” it would be wrong for courts to “blind themselves” to such evidence and risk adopting a construction that would thwart rather than enforce Parliament’s true design.<sup>53</sup>

In addition to this argument, based in effect on strengthening parliamentary supremacy, Lord Browne-Wilkinson relied on more

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47. See *Pepper*, [1993] 1 All E.R. at 42 (listing five Lords of Appeal in Ordinary who heard the initial 1991 appeal); *id.* at 51 (Griffiths, L.J.) (describing himself as “in a judicial minority of one at the end of the first hearing”); *id.* at 52 (Oliver, L.J.) (describing the majority’s determination to dismiss taxpayers’ appeal at the end of the first hearing).

48. See *id.* at 52 (Oliver, L.J.) (justifying his initial position); *id.* at 72–73 (Browne-Wilkinson, L.J.) (same).

49. See *id.* at 54–55 (Browne-Wilkinson, L.J.).

50. See *id.* at 55 (Browne-Wilkinson, L.J.); see also *supra* note 7 (discussing the use of larger panels for especially important issues).

51. Lord Browne-Wilkinson’s speech was endorsed in its entirety by Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Ackner, and Lord Oliver of Aylmerton. See *Pepper*, [1993] 1 All E.R. at 49, 51–52. Lord Griffiths endorsed the result and the leading speech’s treatment of *Hansard*, see *id.* at 50, while the Lord Chancellor, Lord Mackay of Clashfern, dissented, see *id.* at 46–49.

52. See *id.* at 64.

53. See *id.* Relatedly, Lord Browne-Wilkinson also noted the importance of “the purposive approach to construction now [widely] adopted by the courts in order to give effect to the true intentions of the legislature.” *Id.* at 65.

pragmatic considerations as well. One was the illogical nature of current legal distinctions regarding admissibility. The Law Lords had long permitted courts to examine White Papers and commission reports to help ascertain the mischief that a law aimed to correct; a ministerial statement made in Parliament was no less authoritative in this regard.<sup>54</sup> Likewise, the Law Lords had invited courts to rely on ministerial statements made when introducing statutory instruments that could not be amended by Parliament; such statements were not sensibly distinguishable from ministers' introductory statements explaining primary legislation, much of which is never amended prior to passage.<sup>55</sup> A further pragmatic concern was that the exclusionary rule was impeding fairness and transparency in the litigation process. It prevented parties from addressing the courts on parliamentary materials even though many distinguished judges had admitted to peeking at Hansard and drawing their own inferences as to parliamentary intent.<sup>56</sup>

Lord Browne-Wilkinson went on to consider and discuss the various practical and constitutional objections relied on by courts in the past to justify the exclusionary rule. He concluded that concerns over library access and lack of satisfactory indexing for Hansard were overstated. Similar concerns had been voiced with respect to the growing number of statutory instruments, but practitioners were coping with those materials even if at some expense.<sup>57</sup> Lord Browne-Wilkinson also deemed exaggerated concerns that lawyers and judges lacked the sophistication to sift through and assess the weight of various parliamentary statements.<sup>58</sup> Although there would be research costs associated with combing through Hansard in hopes of finding clear evidence of parliamentary intent, these costs were easily over-estimated, especially given the limited nature of admissibility under the Court's new standard.<sup>59</sup>

The lead opinion also made relatively short work of the two principal constitutional arguments for excluding Hansard. With respect to the Article 9 contention, Lord Browne-Wilkinson reasoned that it stretched

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54. *See id.* at 65.

55. *Id.* (drawing analogy to *Pickstone v. Freemans*, [1988] 2 All E.R. 803 (H.L. 1988), discussed *supra* notes 38–40 and accompanying text).

56. *Id.* at 66.

57. *Id.*

58. *Id.*

59. *Id.* at 67. For discussion of the Court's standard, see *infra* notes 64–66 and accompanying text. Lord Griffiths, concurring in the result, emphasized that modern technology "greatly facilitates" the retrieval of Hansard materials, adding that based on personal experience, "it does not take long to recall and assemble the relevant passages in which the particular section was dealt with in Parliament, nor does it take long to see if anything relevant was said." *Id.* at 50.

language and common sense too far to conclude that the use of Hansard for the purpose of construing a statute in court was a “questioning” of the proceedings in Parliament.<sup>60</sup> Moreover, such a conclusion would then have to apply to all media reports reviewing or commenting on what is said in Parliament, an untenable result.<sup>61</sup> With regard to the separation of powers argument, Lord Browne-Wilkinson observed that although statutory words are indeed the law, courts rely on a range of extrinsic sources—including White Papers and official government reports—as aids to construction of those words. The courts’ occasional reliance on parliamentary materials as a further interpretive aid raised no new constitutional question.<sup>62</sup> It is noteworthy that the one Lord who disagreed with the Court’s decision had no constitutional concerns over the outcome; his reservations were directed only at cost-related practical arguments. Invoking the findings of the 1969 Law Commissions, the dissenting judge declined to eliminate the exclusionary rule absent a new comprehensive inquiry into the attendant litigation costs.<sup>63</sup>

Having determined to depart from longstanding precedent, Lord Browne-Wilkinson also set forth a three-part test aimed at limiting British courts’ newly conferred authority to consult and rely on Hansard. First, the statutory text in question had to be ambiguous or obscure, or its literal meaning had to lead to an absurdity.<sup>64</sup> Even then, judicial reliance would not be proper unless the parliamentary record clearly identified either the targeted mischief or the legislative intention underlying the inconclusive text.<sup>65</sup> Finally, parliamentary statements regarding the mischief or underlying intent could be deemed clear only if made by a government minister or other primary proponent of the bill, perhaps accompanied by questions or replies from members that provided proper context.<sup>66</sup>

The lead opinion expressed confidence that its test would constrain counsel’s inclination to invoke Hansard, thereby limiting the costs to parties and courts of having to review and analyze parliamentary materials.<sup>67</sup> To reinforce these limits, Lord Browne-Wilkinson added that attempts to introduce parliamentary material that failed to satisfy the three

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60. *Id.* at 67.

61. *Id.* at 67–68.

62. *Id.* at 69.

63. *Id.* at 48 (Mackay of Clashfern, L.J.). For discussion of the Law Commissions’ report, see *supra* text accompanying notes 29–30.

64. *Id.* at 64 (Browne-Wilkinson, L.J.).

65. *Id.*

66. *Id.* The three factors are restated later in the opinion. *Id.* at 69.

67. *Id.* at 66–67.

factors should trigger an order for costs against the offending party.<sup>68</sup> In addition, the lower courts issued a Practice Direction in 1994, specifying that five working days before a hearing, any party intending to refer to Hansard in court must provide the court and all other parties with copies of the Hansard extract and a summary of the planned argument based on that extract.<sup>69</sup> This direction to counsel, which authorized sanctions for noncompliance, reinforced the judicial view that references to Hansard were not to be undertaken lightly.

The *Pepper* majority applied its new test to the 1976 Finance Act and determined that the parliamentary material was admissible and highly probative. Reasoning that the “cost of the benefit” language in the Act was ambiguous as between an employer’s marginal or average cost,<sup>70</sup> Lord Browne-Wilkinson proceeded to consider the Financial Secretary’s statements in Parliament. The statutory section at issue had sparked concern among members of Parliament because of its possible impact on concessionary travel benefits regularly bestowed on airline and railway employees. Existing government practice had been *not* to tax such benefits on an average cost basis. The Secretary had announced, at the start of a standing committee meeting in May 1976 (reported in Hansard), his withdrawal of a proposed subsection that would have taxed in-house benefits at the price paid by the public.<sup>71</sup> After offering several policy reasons for this change, the Secretary also responded to various member inquiries by explaining that the marginal cost approach would continue to apply to such in-house benefits, and—in a government press release issued that day—he repeated his determination to leave the status quo unaltered.<sup>72</sup>

The following month, at a further committee meeting on the bill, a member asked the Secretary whether the government’s earlier language modification would apply to concessionary fee arrangements for children

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68. *Id.* at 67. In *Melluish v. BMI Ltd.*, [1995] 4 All E.R. 453, 468 (H.L. 1995) (U.K.) (discussed *infra* notes 92–93 and accompanying text), Lord Browne-Wilkinson invoked the need for “appropriate orders as to costs wasted” in rejecting government counsel’s effort to rely on Hansard. It is difficult to know how often the sanction has been imposed by lower courts.

69. Practice Note, [1995] 1 All E.R. 234 (Supreme Court). This direction was reiterated in 1999 and 2002. See Practice Direction, [1999] 1 W.L.R. 1027, 1059–60 (C.A. (Civ)); Practice Direction, [2002] 1 W.L.R. 2870, 2880, 2894 (C.A. (Crim)).

70. *Pepper*, [1993] 1 All E.R. at 69–70.

71. *Id.* at 57–58, 70. See *supra* note 24 (discussing Hansard’s inclusion of all standing committee proceedings).

72. *Id.* at 58–59. The policy reasons presented by the Secretary were (i) the injustice to taxpayers given the large difference between the actual cost of providing the additional services and the amount of benefit that would be taxed to the recipients; (ii) the resultant chill on employees’ use of such services, to the likely detriment of all parties; and (iii) difficulties of enforcement and administration. *Id.* at 58.

of staff at private schools. The Secretary responded affirmatively, stating the government's change meant that "now the [educational] benefit will be assessed on the cost to the employer, which would be very small indeed."<sup>73</sup> There was no further relevant debate on the language prior to enactment.<sup>74</sup>

To Lord Browne-Wilkinson, this legislative history was both clear and persuasive. Committee members had repeatedly pressed the government for guidance regarding the taxation of in-house benefits following the change in text, the minister's statements were directly responsive and unambiguous, and the matter was not raised again after the extended committee discussion. Under these circumstances, the majority reasoned that it was proper "to attribute to Parliament as a whole the same intention as that repeatedly voiced by the Financial Secretary."<sup>75</sup>

The factual setting in *Pepper*, where the government argued in court for an interpretation it had expressly disavowed when promoting the bill in Parliament, might have led the Law Lords to adopt a narrower estoppel-type justification for the admissibility of Hansard materials. Under this approach, courts would be allowed to consult Hansard only in cases where the government's denial in court of a prior officially endorsed position amounted to fundamental unfairness. Counsel for the taxpayers at one point came close to embracing such a rationale,<sup>76</sup> and some Law Lords have subsequently tried to limit *Pepper's* scope based on this theory.<sup>77</sup> Lord Browne-Wilkinson's opinion, however, does not rely on the injustice of the government's reversing its position. His rationale for imputing collective intent is broader: irrespective of the equities involved, "[w]hat is persuasive . . . is a consistent series of answers given by the minister, after opportunities for taking advice from his officials, all of which point the same way and which were not withdrawn or varied prior to the enactment of the Bill."<sup>78</sup>

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73. *Id.* at 60.

74. *Id.*

75. *Id.* at 71.

76. *Pepper*, [1993] A.C. at 598 (reciting argument of appellant's counsel at second hearing, referring to the Financial Secretary's special expertise on complex tax measures and the public's right to rely on his explicit and official representations as to a bill's meaning when arranging their financial affairs).

77. See *infra* notes 106–09 and accompanying text.

78. *Pepper*, [1993] 1 All E.R. at 66. Lord Bridge, in his brief concurring opinion, did raise the estoppel issue, referring to the "acute question as to whether it could possibly be right to give effect to taxing legislation in such a way as to impose a tax which the Financial Secretary . . . had, in effect, assured the House of Commons it was not intended to impose." *Id.* at 49. The importance of this alternative rationale is further addressed *infra* Part I.C.



### *C. Developments Since Pepper*

In the years following *Pepper*, the Law Lords have expressed a range of reactions in considering how and how often to make use of parliamentary materials. The responses by the Court as a whole may be divided into three periods. An initial fifteen-month interval of fairly frequent references to Hansard was followed by a more muted span of over five years, in which doubts surfaced as to the benefits of the *Pepper* approach. The third and current period involves more open disagreement among the Law Lords themselves. Although several Law Lords have expressed regrets about the door that *Pepper* opened, most appear to remain convinced of its wisdom, and the Court's references to Hansard have increased in the years since 2000.

#### *1. Initial Enthusiasm*

Within the first fifteen months after *Pepper* came down, nine House of Lords decisions invoked parliamentary materials to help explain the meaning of legislative text.<sup>79</sup> Given that the Law Lords decided between forty and fifty cases per year during this period,<sup>80</sup> and that some cases did not involve matters of statutory construction, these nine instances qualify as a surge of interest in legislative history. Although a few decisions reflected only tangential use of Hansard,<sup>81</sup> the judges often found the previously forbidden fruit helpful in resolving an interpretive controversy.<sup>82</sup> For instance, Lord Griffiths in one decision invoked Hansard to establish that an earlier court had misapprehended Parliament's true intent with respect to a statute of limitations provision.<sup>83</sup> And Lord

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79. The nine decisions were issued between November 1992 and February 1994. All cases invoking Hansard from 1992 to 2006 were identified by using the following search strategy on Lexis: "Hansard" or "HC debates" or "HL debates" or "Pepper" or "HC official report" or "HL official report."

80. The House of Lords webpage includes a complete list of Law Lords decisions starting in November 1996. See House of Lords, Judicial Business, <http://www.publications.parliament.uk/pa/ld/judgmt.htm> (last visited May 15, 2007). A Lexis search indicates that the Law Lords issued forty-five decisions in 1993 and fifty-one in 1994.

81. See, e.g., *Att'y Gen. v. Associated Newspapers Ltd.*, [1994] 1 All E.R. 556, 566 (H.L. 1994) (U.K.); *Scher v. Policyholders Prot. Bd.*, [1993] 4 All E.R. 840, 852 (H.L. 1993) (U.K.); *Regina v. Preston*, [1993] 4 All E.R. 638, 650 (H.L. 1993) (U.K.).

82. See, e.g., *Holden & Co. v. Crown Prosecution Serv.*, [1994] 1 A.C. 22, 37 (H.L. 1993) (U.K.); *Chief Adjudication Officer v. Foster*, [1993] 1 All E.R. 705, 715-17 (H.L. 1993) (U.K.); *Stubbings v. Webb*, [1993] 1 All E.R. 322, 329 (H.L. 1992) (U.K.); *Regina v. Warwickshire C.C. ex parte Johnson*, [1993] A.C. 583, 588, 591-92 (H.L. 1992) (U.K.).

83. See *Stubbings*, [1993] 1 All E.R. at 329.

Bridge, faced with a language gap regarding appellate courts' authority to order payment of attorneys' costs, remarked that "[h]appily our new freedom to refer to Hansard solves the mystery."<sup>84</sup>

During this initial period, the Law Lords were less than rigorous in applying *Pepper's* three-part test. On a number of occasions, the judges invoked parliamentary material as admissible and relevant without discussing at all the basis for concluding that the *Pepper* factors had been met.<sup>85</sup> Further, the Court's analysis often indicated that the Law Lords were referencing or relying on Hansard even though *Pepper's* ambiguity factor had not been fulfilled. Thus, the judges invoked Hansard as support for what they independently understood to be the meaning of the text.<sup>86</sup> Such confirmatory references may be perfectly reasonable, but they are at odds with *Pepper's* holding that a court could make no use of Hansard at all unless it found that the text was truly ambiguous or obscure.<sup>87</sup>

## 2. *The Bloom Fades*

From early 1994 through 1999, the Court's usage of Hansard in statutory interpretation cases notably diminished. Over a period of close to six years, in which the Law Lords decided roughly fifty cases per year, the judges invoked parliamentary materials in their opinions in a mere thirteen decisions, barely more than twice each calendar year. Apart from the decline in citations to Hansard during this period, there are other indications that the Law Lords had become somewhat less enamored of this new interpretive resource.

On a number of occasions, the Court simply ignored attorneys' legal arguments based on parliamentary materials.<sup>88</sup> Counsel may well have

84. See *Holden*, [1994] 1 A.C. at 37.

85. See, e.g., *Stubbings*, [1993] 1 All E.R. at 329, (Griffiths, L.J.); *Warwickshire*, [1993] A.C. at 587–88, 591–92 (Roskill, L.J.); see also *Associated Newspapers Ltd.*, [1994] 1 All E.R. at 566–67 (Lowry, L.J.) (giving no reason for decision *not* to admit parliamentary materials under *Pepper*).

86. See *Scher*, [1993] 4 All E.R. at 852 (Mustill, L.J.); *Stubbings*, [1993] 1 All E.R. at 329 (Griffiths, L.J.); *Foster*, [1993] 1 All E.R. at 717 (Bridge, L.J.); *Warwickshire*, [1993] A.C. at 592 (Roskill, L.J.). See generally David Miers, *Taxing Perks and Interpreting Statutes: Pepper v. Hart*, 56 MOD. L. REV. 695, 705–06 (1993).

87. The Law Lords also referenced Hansard statements from members other than ministers without discussing specifically how these legislators satisfied the third *Pepper* factor, discussed *supra* note 66 and accompanying text. See *Stubbings*, [1993] 1 All E.R. at 329 (Griffiths, L.J.); see also *Regina v. Preddy*, [1996] 3 All E.R. 481, 487–88 (H.L. 1996) (U.K.) (relying on statements from two members of the House of Lords later in the 1990s).

88. See, e.g., *Regina v. Sec'y for the Home Dep't ex parte Stafford*, [1999] 2 A.C. 38, 41 (H.L. 1998) (U.K.) (summarizing arguments of counsel); *O'Rourke v. Camden London Borough Council*, [1998] A.C. 188, 190 (H.L. 1997) (same); *In re C*, [1997] A.C. 489, 492 (H.L. 1996) (U.K.) (same); *Deposit Prot. Bd. v. Dalia*, [1994] 2 A.C. 367, 372–73 (H.L. 1994) (U.K.) (same).

been encouraged to invoke Hansard materials in their arguments by the Law Lords' initial burst of enthusiasm, and the Court's silence would not alone be sufficient to establish judicial misgivings. In some instances, however, the Law Lords were not merely silent but went further, voicing concern over what they regarded as excessive efforts to promote Hansard. For example, Lord Hobhouse in one opinion referred briefly to counsel's unsuccessful attempt at reliance on Hansard, "purportedly under *Pepper*,"<sup>89</sup> and in another, he criticized a lower court judge by name for taking account of parliamentary debates when *Pepper* gave "no warrant for such an approach."<sup>90</sup>

More frequently in this period, the Law Lords expressly considered arguments relying on Hansard but dismissed them because one or more of *Pepper*'s three factors had not been met. In particular, the Court several times determined that the legislative history cited was either itself unclear or not sufficiently definitive.<sup>91</sup> In *Melluish v. BMI, Ltd.*—a tax case decided in 1995—Lord Browne-Wilkinson, the author of *Pepper*, complained about overreaching by counsel in their introduction of Hansard. He criticized the government for relying on parliamentary materials directed to a tax provision separate from the one under judicial review, adding that to seek guidance from a wholly distinct legislative proceeding was "an improper use of the relaxed rule introduced by *Pepper*."<sup>92</sup> Noting that such efforts to widen the permissible category of parliamentary materials offered no assistance to a court but risked considerable expense and delay, Lord Browne-Wilkinson stated that judges should make "appropriate orders as to costs wasted" in such settings.<sup>93</sup>

Notwithstanding their concerns that counsel were at times pushing the "relaxed rule" of *Pepper* too far, the Law Lords continued to rely on Hansard materials to help resolve disputes over statutory meaning.<sup>94</sup>

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89. *Regina v. Dir. of Pub. Prosecutions ex parte Kebeline*, [1999] 4 All E.R. 801, 851 (H.L. 1999) (U.K.).

90. *Fitzpatrick v. Sterling Housing Ass'n Ltd.*, [1999] 4 All E.R. 705, 745 (H.L. 1999) (U.K.).

91. See *Melluish v. BMI Ltd.*, [1995] 4 All E.R. 453, 468 (H.L. 1995) (U.K.) (Browne-Wilkinson, L.J.); *Sec'y of State for Soc. Sec. v. Remilien*, [1998] 1 All E.R. 129, 146–47 (H.L. 1997) (U.K.) (Hoffmann, L.J.); *Regina v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte*, [1998] 4 All E.R. 897, 931 (H.L. 1998) (U.K.) (Lloyd, L.J.).

92. *Melluish*, [1995] 4 All E.R. at 468.

93. *Id.*

94. See, e.g., *Regina v. Oxfordshire C.C., ex parte Sunningwell Parish Council*, [1999] 3 All E.R. 385, 393 (H.L. 1999) (U.K.) (Hoffman, L.J.); *Lowsley v. Forbes*, [1998] 3 All E.R. 897, 905–06 (H.L. 1998) (U.K.) (Lloyd, L.J.); *Regina v. Preddy*, [1996] 3 All E.R. 481, 487–88 (H.L. 1996) (U.K.) (Goff, L.J.).

Moreover, the Court occasionally sent mixed signals even when formally disavowing reliance on Hansard. In a 1997 decision, the leading speech observed that certain parliamentary materials were not admissible because the text itself was unambiguous, but it then proceeded to refer to those materials for informational background purposes.<sup>95</sup>

Within the academic community, the Law Lords' decision to admit parliamentary materials, which had been greeted with skepticism from the start,<sup>96</sup> continued to generate negative reactions. Academic critics in the late 1990s reiterated that separation of powers principles should preclude judicial reliance on statements by members of the executive or legislative branches expounding on the law they were enacting.<sup>97</sup> These critics also challenged the notion that statements by government ministers could reflect the intention of Parliament, insisting that collective intent was derivable only from the words of the text.<sup>98</sup>

By the late 1990s, some Law Lords were publicly questioning the benefits of the new interpretive approach. In a 1997 lecture, Lord Hoffmann expressed sympathy in principle for judicial use of Hansard both because it could estop the executive from abandoning interpretive representations made before Parliament and because a high profile ministerial statement from which no member dissented was at times the best evidence of what Parliament must have understood it was approving.<sup>99</sup> Yet Lord Hoffmann was doubtful whether the time and money spent on Hansard research was justified given how seldom it yielded truly probative results.<sup>100</sup>

In a 1999 address, Lord Millett was more blunt, referring to *Pepper* as a "regrettable decision" in practical terms and also as a matter of

95. *Inland Revenue Comm'rs v. Willoughby*, [1997] 4 All E.R. 65, 69–71 (H.L. 1997) (U.K.) (Nolan, L.J.).

96. See Baker, *supra* note 4; Miers, *supra* note 86; Styles, *supra* note 4.

97. See, e.g., Geoffrey Marshall, *Hansard and the Interpretation of Statutes*, in *THE LAW IN PARLIAMENT* 139, 153–54 (Dawn Oliver & Gavin Drewry eds., 1998); Robert Summers, *Interpreting Statutes in Great Britain and the United States—Should Courts Consider Materials of Legislative History?*, in *THE LAW, POLITICS, AND THE CONSTITUTION: ESSAYS IN HONOUR OF GEOFFREY MARSHALL* 222, 231–32 (David Butler et al. eds., 1999); see also DAVID ROBERTSON, *JUDICIAL DISCRETION IN THE HOUSE OF LORDS* 183 (1998) (expressing concern that *Pepper* allows courts to rely on ministerial statements undermining civil liberties when the text being "explained" would not be viewed as accomplishing such a result). Academic criticism on constitutional grounds has not yet abated. See generally Aileen Kavanagh, *Pepper v. Hart and Matters of Constitutional Principle*, 121 L.Q. REV. 98 (2005).

98. See Marshall, *supra* note 97, at 151–53; Summers, *supra* note 97, at 232–33, 235–36.

99. Lord Hoffmann, *supra* note 5, at 669.

100. *Id.* at 668; see also Lord Johan Steyn, *Interpretation: Legal Texts and Their Landscape*, in *THE CLIFFORD CHANCE MILLENNIUM LECTURES: THE COMING TOGETHER OF THE COMMON LAW AND THE CIVIL LAW* 79, 87–88 (Basil S. Markesinis ed., 2000).

constitutional principle.<sup>101</sup> He discussed the impropriety of relying on unenacted intentions as well as the largely unproductive costs of Hansard-related research.<sup>102</sup> Lord Millett added, however, that although he objected to judicial references to the course of proceedings in Parliament, he endorsed “the practice of the American Congress of publishing detailed explanatory memoranda” that were not “made in the heat of debate.”<sup>103</sup> The “explanatory memoranda” presumably refers to congressional committee reports.

Beginning in 2000, the concerns that had been voiced extrajudicially became part of an at times heated dialogue aired through the judicial opinions of the Law Lords.

### 3. *Full-Scale Debate*

An opening salvo from Lord Steyn, a member of the Law Lords since 1994, focused the terms of the debate. In his Hart Lecture delivered at Oxford in May 2000, Lord Steyn assumed a lead critic’s stance comparable to Justice Scalia’s role in the Supreme Court. He acknowledged that he had initially supported the *Pepper* court’s majority opinion but declared that he had come to regard its current application as indefensible primarily on separation of powers grounds.<sup>104</sup>

Lord Steyn did *not* propose to overrule *Pepper*, but instead to limit its scope. He believed that courts could cite to Hansard to identify the mischief at which a law was aimed, for the reasons Lord Browne-Wilkinson gave in *Pepper*.<sup>105</sup> He also believed that courts should rely on Hansard to prevent the executive from repudiating prior representations made to Parliament as to the meaning of statutory text, developing the estoppel argument suggested earlier by Lord Hoffmann.<sup>106</sup> What he

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101. Lord Millett, *supra* note 5, at 110.

102. *Id.*

103. *Id.*

104. See Lord Steyn, *supra* note 5, at 62–68. Lord Steyn dismissed the Article 9 constitutional argument invoked by some academics, see *supra* notes 23–24 and accompanying text, as “transparently weak.” Lord Steyn, *supra* note 5, at 62. He repeated his previously expressed pragmatic concern that resort to Hansard was an “expensive luxury in our legal system” and also restated the by-now familiar arguments against there being any discernible “intention” of Parliament outside of the text. *Id.* at 63–64.

105. See Lord Steyn, *supra* note 5, at 68, 70 (referring to analogy between Hansard and White Papers or commission reports in this regard).

106. See *id.* at 67, 70; cf. *supra* text accompanying note 99. This executive estoppel argument continues to receive support from some scholars. See, e.g., Francis Bennion, *Executive Estoppel: Pepper v. Hart Revisited*, PUB. L., Spring 2007, at 1, available at <http://www.francisbennion.com/2007/003.htm>.

renounced, however, was the broader rationale for citing to Hansard; he maintained that it was “constitutionally unacceptable . . . to treat the intentions of the government as revealed in debates as reflecting the will of Parliament.”<sup>107</sup> Lord Steyn has since presented his proposed limitations on *Pepper* in a number of judicial opinions. He has invoked parliamentary materials to help determine the mischief that a statute is intended to correct,<sup>108</sup> but he maintains that ministerial statements in Hansard should be used *only* for this purpose or as an estoppel against the executive and *not* as evidence reflecting what Parliament meant by particular statutory words or phrases.<sup>109</sup>

In the years since 2000, a number of Law Lords have expressed disappointment over what they view as the scant benefits and considerable costs associated with the use of Hansard. During this time period, the Court has been regularly attentive to *Pepper*’s three factors, often finding Hansard materials inadmissible either because ministerial statements were inconclusive<sup>110</sup> or because the text itself was clear.<sup>111</sup> Lord Hoffmann in 2002 was more outspoken, declaring that based on ten years of experience under *Pepper*, the dissenting judge in that decision “ha[d] turned out to be the better prophet” in terms of predicting how rarely Hansard would be helpful compared to how heavily counsel would invest in mining the “large spoil heap of [parliamentary] material.”<sup>112</sup>

107. Lord Steyn, *supra* note 5, at 68.

108. See *Lesotho Highlands Dev. Auth. v. Impreglio SpA* [2005] UKHL 43, [2005] 3 All E.R. 789, 798–99 (U.K.); *Regina v. Soneji* [2005] UKHL 49, [2005] 4 All E.R. 321, 324–25 (U.K.).

109. See *Jackson v. Att’y Gen.* [2005] UKHL 56, [2005] 4 All E.R. 1253, 1285 (U.K.) (Steyn, L.J., concurring); *McDonnell v. Congregation of Christian Bros. Trs.* [2003] UKHL 63, [2004] 1 All E.R. 641, 655–56 (U.K.) (Steyn, L.J., concurring). Although Lord Steyn originally tendered the estoppel argument as a preferred modification to the *Pepper* rule, Lord Hope has adopted the same argument as embodying the proper understanding of *Pepper*. See *Wilson v. First County Trust Ltd.*, [2003] UKHL 40, [2003] 4 All E.R. 97, 130–31 (U.K.) (Hope, L.J., concurring); *Regina v. Sec’y of State for the Env’t, Transp. and the Regions ex parte Spath Holme Ltd.*, [2001] 1 All E.R. 195, 226–27 (H.L. 2000) (U.K.) (Hope, L.J., concurring). This seems manifestly incorrect as a reading of the majority opinion in *Pepper*, see *supra* text accompanying notes 76–78, although the Court has not explicitly rejected Lord Hope’s position in subsequent decisions.

110. See, e.g., *Quintavalle v. Human Fertilisation & Embryology Auth.* [2005] UKHL 28, [2005] 2 All E.R. 555, 564 (U.K.) (Hoffmann, L.J.); *Robinson v. Sec’y of State*, [2002] N. Ir. L.R. 390, 400 (U.K.) (Bingham, L.J.), 404 (Hoffmann, L.J.); *Ex parte Spath Holme*, [2001] 1 All E.R. at 211–12 (Bingham, L.J.), 219 (Nicholls, L.J.).

111. See, e.g., *Aston Cantlow Parochial Church Council v. Wallbank* [2003] UKHL 37, [2003] 3 All E.R. 1213, 1225 (U.K.) (Hope, L.J.); *Ex parte Spath Holme*, [2001] 1 All E.R. at 212 (Bingham, L.J.).

112. *Robinson*, [2002] N. Ir. L.R. at 405; see also *P. v. Nat’l Ass’n of Schoolmasters/Union of Women Teachers* [2003] UKHL 8, [2003] 1 All E.R. 993, 1004 (U.K.) (Hoffmann, L.J.) (referring to “the usual hopeless attempt to obtain guidance from Parliamentary debates under the rule in *Pepper*”).

Apart from giving vent to practical frustrations, the Law Lords have identified some additional limits on the scope of *Pepper*. In *Regina v. Secretary of State for the Environment ex parte Spath Holme Ltd.*,<sup>113</sup> decided in December 2000, the issue was whether the Secretary could exercise his statutory power to restrict rent increases solely for the purpose of controlling inflation; if so, then his restricting rents for a different reason (to mitigate hardship for a class of tenants in this particular case) was ultra vires.<sup>114</sup> The Court of Appeal had consulted Hansard to help determine that the rent-restricting powers had been enacted as part of government counterinflationary policy, and therefore the Secretary's use of them for another reason was unlawful.<sup>115</sup> The Law Lords reversed, construing the relevant text to mean that there were no inflation-related limitations on the Secretary's authority to impose a rent ceiling.<sup>116</sup>

More important for Hansard purposes, the lead opinion went on to distinguish *Pepper*, which had turned on the meaning of a particular statutory phrase, from the instant case, which involved the scope of the government's discretionary powers conferred by statute. Lord Bingham, who delivered the leading speech, reasoned that because such powers are inevitably open-ended, a minister's contribution in Parliament is very unlikely to resolve doubts about all or even most future uses of these powers.<sup>117</sup> He concluded—echoing to some extent Lord Steyn's estoppel rationale—that unless a ministerial statement or response gave “a categorical assurance to Parliament that a power would not be used in a given situation, such that Parliament could be taken to have legislated on that basis,” ministerial statements addressed to the scope of a discretionary power were inadmissible.<sup>118</sup>

The Law Lords announced a further restraint on judicial use of Hansard in *Wilson v. First County Trust Ltd.*,<sup>119</sup> issued in July 2003. That case involved whether a 1974 consumer credit statute was compatible with the

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113. *Ex parte Spath Holme*, [2001] 1 All E.R. 195.

114. *Id.* at 198.

115. *Regina v. Sec'y of State for the Env't, Transp. & the Regions* [2000] 1 All E.R. 884, 899–900 (C.A. 2000) (U.K.), *rev'd*, [2001] 1 All E.R. 195 (H.L. 2000).

116. *See Ex parte Spath Holme*, [2001] 1 All E.R. at 219 (Nicholls, L.J.), 211–12 (Bingham, L.J.), 226–27 (Hope, L.J.), 219–23 (Cooke, L.J.), 233 (Hutton, L.J.).

117. *See id.* at 211–12 (Bingham, L.J.).

118. *See id.* at 212; *see also id.* at 227 (Hope, L.J.) (contending that *Pepper* should be understood to admit Hansard materials only on an estoppel rationale, and endorsing Lord Bingham's use of that rationale here). *But see id.* at 218–19 (Nicholls, L.J.), 219–23 (Cooke, L.J.) (contending that ministerial statements addressed to scope of a discretionary power are admissible with varying degrees of persuasive weight).

119. [2003] UKHL 40, [2003] 4 All E.R. 97 (U.K.).

European Convention of Human Rights, which had been integrated into British law pursuant to the 1998 Human Rights Act.<sup>120</sup> As part of its review, the Court considered whether Hansard materials could be consulted in order to help determine compatibility.

Lord Nicholls, authoring the leading speech, concluded that courts were allowed to invoke parliamentary materials in this setting but only to a limited extent. He noted that evaluating the effect of domestic legislation to ascertain whether British law was incompatible with European Convention rights is a different enterprise from directly interpreting and applying such legislation.<sup>121</sup> If the domestic law infringes on a convention right, a court must determine whether the law's policy objective presumptively justifies such an infringement given the nature of the convention right and also whether the means the domestic law employs to achieve its policy objective are proportionate in terms of the adverse effect.<sup>122</sup> Lord Nicholls concluded that when identifying a law's policy objective or assessing its proportionality, a court is permitted to consult Hansard to seek "enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed," but not to explore statutory meaning in further respects.<sup>123</sup>

Lord Nicholls likened this approved use of Hansard "as a source of background information" to other "innocuous" uses previously countenanced under *Pepper*. He referred specifically to the use of ministerial statements that help identify the background when construing domestic statutes or that assist a court in understanding government policy when reviewing contested agency decisions.<sup>124</sup> But Lord Nicholls added that beyond such reliance for background information purposes, Hansard

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120. See *id.* at 109 (Nicholls, L.J.). Section 3 of the Human Rights Act provides that "'so far as it is possible' [to do so, all domestic] . . . legislation 'must be read and given effect in a way which is compatible with Convention rights.'" *Id.* at 135 (Hobhouse, L.J.) (emphasis added). This parliamentary mandate, akin in some respects to our constitutional avoidance canon, has generated disagreement among the Law Lords; it has been interpreted by some judges to apply even if there is no ambiguity in the text being construed. See, e.g., *Regina v. A.* [2001] UKHL 25, [2001] 3 All E.R. 1, 17 (U.K.) (Steyn, L.J.).

121. *Wilson*, [2003] 4 All E.R. at 117.

122. *Id.* at 117–18. The Human Rights Act allows British courts to make declarations of incompatibility but not to set aside Acts of Parliament that are inconsistent with Convention rights. For discussion of legal developments on compatibility under the 1998 Act, which became effective in October 2000, see Nicholas Bamforth, *Courts in a Multi-Layered Constitution*, in *PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION* 277, 290–301 (Nicholas Bamforth & Peter Leyland eds., 2003); INGMAN, *supra* note 7, at 182–89; ZANDER, *supra* note 7, at 184–89.

123. *Wilson*, [2003] 4 All E.R. at 118–19.

124. *Id.* at 117. On the second "routine" use of Hansard, the court cited its earlier decision in *Brind* as an apt example. See *supra* text accompanying notes 36–37.



was not relevant to the issues a court must resolve in compatibility cases. In particular, a statute's proportionality was to be addressed based on its text, not the quality of the reasons advanced by its proponents or the state of mind of ministers debating its merits.<sup>125</sup>

The decisions since 2000 thus disclose a range of practical and conceptual misgivings associated with reliance on *Hansard*. Judges have complained about the excessive burdens that clients, counsel, and courts face in having to sift through parliamentary materials. Individual opinions have also articulated several possible grounds for limiting *Hansard*'s admissibility when construing the meaning of statutory text. These grounds include refusing to consider ministerial statements that address the scope of a discretionary government power, that bear on incompatibility under the Human Rights Acts, or that extend beyond estopping the government from contradicting in court what it previously said in Parliament.

Despite such doubts, however, the Law Lords have by no means abandoned the basic rule of *Pepper*. From 2002 through 2005, *Hansard* materials were discussed by one or more panel members in forty out of some 250 decided cases—an average of ten per calendar year and roughly one-sixth of the Court's decisions. There are a number of occasions where the Law Lords invoked *Hansard* for one of the purposes labeled "innocuous" in *Wilson*: to understand agency implementations of government policy that are subject to judicial review<sup>126</sup> or to identify the

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125. *Wilson*, [2003] 4 All E.R. at 119. As part of his analysis, Lord Nicholls cited with approval Lord Steyn's Hart lecture, focusing on the "conceptual and constitutional difficulties" of treating the government's intentions revealed in debate as reflecting the will of Parliament. *Id.* at 117.

A third possible limitation on the use of *Hansard* was raised by Lord Bingham in another case decided in 2003. *See McDonnell v. Congregation of Christian Bros. Trs.* [2003] UKHL 63, [2004] 1 All E.R. 641, 653 (U.K.). In considering the meaning of a 1963 statute setting limitation periods for various claims, the Law Lords were referred to *Hansard* materials that had been off limits at the time (prior to 1992) the Court originally had construed the provision at issue. Lord Bingham opined that absent exceptional circumstances, it would be inappropriate for the Law Lords to invoke *Hansard* in order to depart from any authoritative statutory ruling rendered prior to *Pepper*. *See id.* This statement, however, seems unpersuasive given that the Law Lords in a unanimous 1993 decision had relied on *Hansard* to overrule an authoritative 1964 ruling by the Court of Appeal. *See Stubbings v. Webb*, [1993] 1 All Eng. 322, 328–29 (H.L. 1992) (U.K.) (Griffiths, L.J.). Despite his reservation as to the admissibility of *Hansard* in the *McDonnell* case, Lord Bingham went on to consider *Hansard* in his opinion, finding the parliamentary materials inconclusive on the issue presented. *Id.* at 653–54; *see also Vogenauer, supra* note 4, at 651–52 (expressing doubts that Lord Bingham's view carries any authority).

126. *See, e.g., A. v. Sec'y of State for the Home Dep't* [2004] UKHL 56, [2005] 3 All E.R. 169, 187 (U.K.) (Bingham, L.J.); 226 (Hope, L.J.); *Anderson v. Sec'y of State for the Home Dep't* [2002] UKHL 46, [2002] 4 All E.R. 1089, 1104–05 (U.K.) (Steyn, L.J.); *Saadi v. Sec'y of State for the Home Dep't* [2002] UKHL 41, [2002] 4 All E.R. 785, 789 (U.K.) (Slynn, L.J.).

background mischief at which a statute was aimed.<sup>127</sup> Still, the largest single number of decisions involves reference to Hansard to shed light on the meaning of possibly inconclusive statutory words or phrases.<sup>128</sup>

A recent broad-based discussion of *Pepper* and its applications took place in *Jackson v. Attorney General*,<sup>129</sup> decided in October 2005. Nine Lords of Appeal in Ordinary participated in the decision. *Jackson* indicates that some Law Lords—although certainly not Lord Steyn—remain willing to apply *Pepper* in its more controversial sense. The case involved a challenge to the validity of the Hunting Act of 2004. The statute, which prohibited fox-hunting, had been enacted without approval from the House of Lords, consistent with a special procedure for bypassing the upper chamber that had been enacted in 1911 and modified in 1949.<sup>130</sup> The real question presented was whether this special procedure, enacted as section 2(1) of the 1911 law, authorized its own further modification by the Commons alone, as had occurred in 1949.<sup>131</sup> The Court of Appeal had determined that the 1911 Act was inconclusive on its face and had relied extensively on parliamentary materials from 1911 to conclude that the

127. See, e.g., *Regina v. Soneji* [2005] UKHL 49, [2005] 4 All E.R. 321, 324–25 (U.K.) (Steyn, L.J.); *Lesotho Highlands Dev. Auth. v. Impreglio* [2005] UKHL 43, [2005] 3 All E.R. 789, 798–99 (U.K.) (Steyn, L.J.); *Ghaidan v. Mendoza* [2004] UKHL 30, [2004] 3 All E.R. 411, 426–27 (U.K.) (Steyn, L.J.).

128. See, e.g., *In re R.* [2005] UKHL 33, [2005] 4 All E.R. 433, 437–38 (U.K.); *Hooper v. Sec’y of State for Work & Pensions* [2005] UKHL 29, [2006] 1 All E.R. 487, 503 (U.K.); *Jindal Iron & Steel Co. Ltd. v. Islamic Solidarity Shipping Co. Inc. Jordan* [2004] UKHL 49, [2005] 1 All E.R. 175, 187–88 (U.K.); *Mirvahedy v. Henley* [2003] UKHL 16, [2003] 2 All E.R. 401, 438 (U.K.); *Morgan Grenfell & Co. v. Special Comm’rs* [2002] UKHL 21, [2002] 3 All E.R. 1, 10 (U.K.). From 2002 to 2005, there were eighteen cases in which the Court referenced Hansard primarily for the purpose of helping to discern the meaning of statutory words, as opposed to nine cases where the principal focus of the Hansard discussion was on identifying the background mischief, and fourteen cases where Hansard was invoked primarily to help clarify government policy being subjected to judicial review. A similar distribution applies for cases invoking parliamentary materials in the period from 1996 through 2001. Of the seventeen cases in which Hansard is referenced in one or more judicial opinions, nine instances involve primarily the meaning of statutory words, two relate primarily to identifying the background mischief, and six involve clarifying government policy subject to judicial review. These three different uses of Hansard are further discussed *infra* Part II.A and Part III.B.

129. [2005] UKHL 56, [2005] 4 All E.R. 1253 (U.K.).

130. See *id.* at 1256–57.

131. See *id.* The 1911 Act, approved by both houses, permitted the House of Commons to bypass the House of Lords and enact into law a bill approved by the Commons in three successive sessions, provided the period of time between second reading in the first session and passage in the third session was at least two years. *Id.* at 1262–63. The 1949 Act reduced the number of required Commons sessions approving the bill from three to two and the total elapsed time for all considerations from two years to one. Importantly, the 1949 Act was enacted without approval from the House of Lords. *Id.* at 1256–57.

special procedure could lawfully be used to amend itself, and therefore that the 1949 Act modifications (as applied in 2004) were valid.<sup>132</sup>

The Law Lords unanimously upheld the validity of the Hunting Act, dismissing the legal challenge to the 1949 law's enactment under the special procedure. With respect to reliance on Hansard, Lord Bingham's leading speech concluded that reference to the parliamentary debates and explanatory statements from ministers was unnecessary because the 1911 text, properly understood, was neither ambiguous nor obscure.<sup>133</sup> Lord Bingham did invoke Hansard, however, to establish how the record of amendments to section 2(1), considered by the Commons majority during a three-month period in 1911, helped illuminate the meaning of key words in that section. Specifically, section 2(1) as initially drafted had applied its special procedure to “*any Public Bill other than a Money Bill.*”<sup>134</sup> Over the ensuing months, the Commons considered at least nine amendments proposing to enlarge the class of bills to which the new special procedure would *not* apply.<sup>135</sup> Observing that one of these amendments was accepted but eight were “uniformly rejected” by the Commons, Lord Bingham concluded, “[I]t is clear from the historical background that Parliament did intend the word ‘any,’ subject to the noted exceptions [in text], to mean exactly what it said.”<sup>136</sup>

Thus, although Lord Bingham's lead speech made a point of eschewing reliance on ministerial statements offered in the course of parliamentary debate, it relied directly on the statute's drafting history—recorded in Hansard but hardly obvious from the face of the text as finally enacted—to help explain the meaning of statutory words. Lord Nicholls in a concurring speech was prepared to go further with Hansard. He concluded that section 2(1) was sufficiently clear, but he also believed that the ministerial statements made during parliamentary passage of the 1911 Act were valuable to confirm the apparent meaning of the text.<sup>137</sup> Citing to statements by the Prime Minister among others, Lord Nicholls urged open recognition of their relevance in the interests of transparency.<sup>138</sup>

On the other side, Lord Steyn (also concurring in the result) restated his preference that resort to Hansard to discover the intended meaning of enacted text be limited only to situations of estoppel against the

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132. See *Jackson v. Att'y Gen.*, [2005] 2 W.L.R. 866, 889–92 (C.A. 2005) (U.K.).

133. [2005] 4 All E.R. at 1271.

134. See *id.* at 1263 (emphasis added).

135. See *id.* at 1263–64.

136. See *id.* at 1268.

137. See *id.* at 1276.

138. *Id.* at 1276–77.

government.<sup>139</sup> He was content here, however, to rely on *Pepper*'s three-part test and exclude Hansard references because the text itself was clear.<sup>140</sup> Lord Walker, Lord Carswell, and Lord Brown opined more briefly that resort to Hansard was unnecessary in this case.<sup>141</sup>

An even more recent indication of *Pepper*'s continuing vitality occurred in July 2006, when three members of the Law Lords made a point of observing that reliance on Hansard remains valuable as an aid to the construction of text—including text that is not ambiguous or obscure. In *Harding v. Wealands*,<sup>142</sup> Lord Hoffmann—who had voiced misgivings about *Pepper* in some prior opinions—delivered a leading speech in which he relied at length on parliamentary proceedings to help explain what the word “procedure” meant in a private international law statute, even though he regarded the term as clear without resorting to Hansard.<sup>143</sup> Lord Rodger applied a similar analysis, noting that available Hansard materials not only confirmed but also strengthened the textual construction he would have offered anyway.<sup>144</sup> Lord Carswell added a hopeful gloss on the court's extended travails regarding legislative history. He characterized *Pepper* as having been “out of judicial favour in recent years,” but expressed regret over this development, adding that ministerial statements were at times useful as an interpretive resource, “*perhaps especially as a confirmatory aid.*”<sup>145</sup>

To sum up, the Law Lords in 2006 continue to rely on Hansard materials as an aid to statutory interpretation, albeit less enthusiastically than they did in the first fifteen months after *Pepper* was decided. There is reason to believe that lower courts refer to Hansard with some regularity as well, although such usage is beyond the scope of this article.<sup>146</sup> Lord

139. *Id.* at 1285.

140. *Id.*

141. *Id.* at 1297 (Walker, L.J.), 1304 (Carswell, L.J.), 1310 (Brown, L.J.). Even brevity could not conceal some differences: Lord Walker acknowledged disagreement among his colleagues on the application of *Pepper* but “prefer[ed] to express no view” on the matter, *id.* at 1297, while Lord Carswell discounted Lord Bingham's use of parliamentary materials by declaring that he had taken no account of defeated or withdrawn amendments, the history of which was recorded in Hansard, *id.* at 1304. The three remaining panel members—Lord Hope, Lord Rodger of Earlsferry, and Baroness Hale of Richmond—delivered separate opinions but did not comment on the Hansard issues. *See id.* at 1287–97, 1298–1303.

142. [2006] UKHL 32, [2006] 4 All E.R. 1 (U.K.).

143. *See id.* at 12–13.

144. *See id.* at 23.

145. *Id.* at 25 (emphasis added). A fourth panel member, Lord Woolf, also embraced the utility of *Pepper* to illuminate the meaning of statutory language if the text is unclear. *See id.* at 6.

146. *See, e.g.,* Lewis v. Eliades [2003] EWCA (Civ) 1758, [2004] 1 W.L.R. 692, 702–03 (C.A. 2003); Matthews v. Ministry of Def. [2002] EWCA (Civ) 773, [2002] 1 W.L.R. 2621, 2639–40 (C.A. 2002); Sunderland Polytechnic v. Evans, [1993] I.R.L.R. 196, 196 (Employment Appeal Tribunal).

Steyn's proposal to restrict judicial uses of Hansard to estoppel situations remains on the table, but it seems doubtful that most current Lords of Appeal would endorse it.<sup>147</sup> Practical concerns based on cost-benefit calculations have arisen with some frequency in various judicial opinions. At the same time, one member of the Law Lords has derided the "traditionalists" for acting "as if to be seen openly to read Hansard is akin to being caught with pornography,"<sup>148</sup> and it is well known that judges privately acknowledge looking at Hansard considerably more often than they cite to it in their opinions.<sup>149</sup>

## II. WHY LEGISLATIVE HISTORY USAGE REMAINS GREATER IN THE UNITED STATES

At this point, it is appropriate to ask what, if any, lessons for American statutory interpretation can be gleaned from the intricate yet somewhat muddled state of affairs in Britain. Does the Supreme Court rely on legislative history more or less frequently than its British counterpart? Do the two legal cultures place the same value on legislative history as an interpretive resource? Do they espouse similar justifications for its use? Are there differences in the two law-making systems that can help explain why judicial reliance might be greater in one country than the other? In an effort to answer these and related questions, I turn to the perspective afforded by comparative analysis.

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*See generally* Kenny Mullan, *The Impact of Pepper v. Hart*, in *THE HOUSE OF LORDS: ITS PARLIAMENTARY AND JUDICIAL ROLES* 213, 216–17, 229–33 (Paul Carmichael & Brice Dickson eds., 1999); Vogenauer, *supra* note 4, at 635, 639–42.

147. As discussed in this Part, Lord Steyn and Lord Hope have embraced the notion that Hansard should be invoked to aid courts in construing statutory words or phrases only if warranted to estop the executive from abandoning prior representations, while Lord Nicholls and Lord Bingham have effectively rejected this position. Lord Steyn has stepped down as a Lord of Appeal in Ordinary, and as of August 2007, he will be mandatorily retired from participating in judicial business. *See* The United Kingdom Parliament, The Law Lords, [www.parliament.uk/about\\_lords/the\\_law\\_lords.cfm](http://www.parliament.uk/about_lords/the_law_lords.cfm) (last visited Aug. 15, 2006). Meanwhile, Lords Hoffmann, Rodger, Carswell, and Woolf also have eschewed the proposed estoppel restriction, declaring as a general matter that Hansard remains a valuable aid for construing statutory text. *See also* Philip Sales, *Pepper v. Hart: A Footnote to Professor Vogenauer's Reply to Lord Steyn*, 26 O.J.L.S. 585, 585–86 (2006) (contending that estoppel rationale has never been adopted as binding by the Law Lords).

148. Robin Cooke, *The Road Ahead for the Common Law*, 53 INT'L & COMP. L.Q. 273, 282 (2004). Lord Cooke, formerly President of the New Zealand Court of Appeals, participated on more than forty Law Lords panels between 1996 and 2001. *See infra* note 158 (discussing search methods for individual judicial opinions).

149. *See supra* note 56 and accompanying text.

### A. Empirical Observations

For quantitative purposes, I have chosen to compare the Law Lords' legislative history references from 1996 through 2005 with legislative history treatment by the Supreme Court during the same ten-year period. The comparisons are less than perfect because the universes of cases being reviewed are not identical. On the British side, I have included all decisions with opinions by the Law Lords from January 1996 through December 2005—a total of 591 cases. On the U.S. side, I have focused on two subsets of Supreme Court decisions from 1996 through 2005 on which I had readily obtainable data: cases that directly addressed some aspect of the employment relationship (labor and employment decisions),<sup>150</sup> and cases that involved interpretation of federal tax statutes (tax decisions).<sup>151</sup>

These two subsets of the Supreme Court's overall decision docket comprise 145 decisions—roughly one-fifth of all decisions with published opinions during the ten-year period.<sup>152</sup> They also reflect some variation with regard to politicized aspects of the Court's docket. Labor and employment cases more often present public policy questions in direct or explicit form, whereas tax cases tend to be technical and less ideologically charged. The tax decisions consist only of cases that involve the interpretation of a federal tax statute and thus are more likely to include references to legislative history than data sets that have common law and

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150. The ten years of labor and employment law cases are part of a data set compiled by the author that consists of more than 650 cases decided between November 1969 and June 2006. The dataset has been discussed in recent articles analyzing judicial reasoning. See, e.g., Brudney & Ditslear, *supra* note 8; James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) [hereinafter Brudney & Ditslear, *Canons of Construction*]. For discussion of how the data set was assembled, see *id.* at 15–16.

151. The ten years of tax law cases are part of a data set consisting of some three hundred cases decided between November 1953 and December 2005 that was compiled by a team of law professors and social scientists. See Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909 (2005); Lee Epstein et al., *Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code*, 13 WASH. U. J.L. & POL'Y 305 (2003). For a discussion of how the data set was assembled, see Staudt et al., *supra*, at 1926–27.

152. The Supreme Court decided some 750 cases with published opinions in the ten Terms from 1996 through 2005. See LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM, tbl. 2-11 (3d ed. 2003); Akin, Gump, Strauss, Hauer & Feld, *Statistics for the Supreme Court's October Term 2005*, 75 U.S. L. WK., July 18, 2006, at 3029. Between January 1996 and December 2005, the Supreme Court issued 127 labor and employment decisions and 24 tax decisions. Six of these cases appear in both data sets: they are decisions directly involving employees or their interests that also involve interpretation of a federal tax statute. The six have been included in the tax decisions data set only, in order to avoid duplication. The author, ably assisted by Chad Eggspuehler (class of 2009 at The Ohio State University Moritz College of Law), compiled the labor and employment and tax decisions, including the six overlapping cases, by searching the data sets identified *supra* note 151. Copies of the lists are available from the author.

constitutional decisions mixed in as well.<sup>153</sup> Still, the two subsets of Supreme Court decisions, relating to separate areas of federal law, offer useful benchmarks for assessing whether recent British judicial interest in legislative history equals or approaches U.S. judicial investment in this interpretive resource.

For the two U.S. data sets, I report not only the numbers of cases in which one or more of the Justices reference or discuss legislative history, but also the numbers of cases where the majority affirmatively *relies* on legislative history as a probative or determining factor in its reasoning process. Use of legislative history as an asset to justify or buttress the Court's holding is more powerful—and less frequent—than the total of all legislative history references. Instances of reliance on legislative history do not include cases in which the majority merely descriptively references legislative history in the course of discussion, or references it in a “deflecting” manner so as to dismiss the value ascribed to it by a litigant, a lower court, or a dissenting justice.<sup>154</sup> Both reliance and overall reference are important and worth noting, and reporting them separately allows for a more nuanced appreciation of legislative history usage by the Supreme Court.

I did not include a similar distinction for the Law Lords, however, because it was impracticable to do so. The Law Lords do not issue formally designated majority opinions.<sup>155</sup> The leading speech may announce a result that other panel members endorse in their speeches, but in many instances these additional speeches do not include cross-references to the Hansard-related reasoning of speeches delivered by colleagues, nor even to the leading speech in the case.<sup>156</sup> Accordingly, it is

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153. The Law Lords decisions include such non-statutory cases, as does the Supreme Court labor and employment data set. Law Lords cases that do not raise statutory issues typically involve matters of common law. Based on my review of the Law Lords data set, these decisions comprise roughly fifteen percent of the 591 cases decided from 1996 through 2005. Supreme Court labor and employment cases that do not raise issues of federal statutory law almost always involve constitutional questions. My search of this data set indicates that the non-statutory decisions were about ten percent of the 127 cases decided during the same ten years. Lists of these non-statutory cases decided by both Courts are available from the author. In addition, unlike the tax law data set, the labor and employment decisions also include cases that focus on jurisdictional questions, evidentiary matters, and issues of state law. Such issues may, in the aggregate, be less likely to implicate legislative history than traditionally doctrinal matters of federal statutory interpretation.

154. For further discussion of this distinction between reliance on and reference to legislative history, see Brudney & Ditslear, *Canons of Construction*, *supra* note 150, at 24–26.

155. The Law Lords' more individualistic style of judicial opinions stems in part from their structure of decision making. Sitting typically in panels of five judges, the twelve Lords of Appeal in Ordinary are unlikely to express either methodological or doctrinal positions with the coherence of our Supreme Court, which decides all cases en banc. See generally ROBERTSON, *supra* note 97, at 24–26.

156. See, e.g., *Regina v. Soneji* [2005] UKHL 49, [2005] 4 All E.R. 321, 334–42 (U.K.) (Rodger

simply too precarious to assume that one Lord of Appeal’s reliance on, dismissal of, or citation to Hansard materials is endorsed on any regular basis by others who approve the same outcome.

Finally, in making the comparison between British and U.S. legislative history treatment, I have divided the ten-year period into two equal intervals. Legislative history references are identified for each five-year interval as well as for the entire ten years. Table One reports all results for the 1996–2005 period.

TABLE ONE—LEGISLATIVE HISTORY TREATMENT 1996–2005:  
PERCENTAGE OF DECISIONS\* INVOKING LEGISLATIVE HISTORY<sup>157</sup>

	1996–2000	2001–2005	Total
<b>Law Lords Usage</b>	5.6% (15)	13.4% (43)	9.8% (58)
<b>Supreme Court:</b>			
Lab. & Emp. Reference	37% (25)	54% (29)	45% (54)
Lab. & Emp. Reliance	25% (17)	30% (16)	27% (33)
Tax Reference	64% (7)	69% (9)	67% (16)
Tax Reliance	55% (6)	23% (3)	38% (9)

\*Actual numbers of Law Lords decisions using legislative history, or Supreme Court decisions referring to/relying on legislative history, for each time period are in parentheses.

As Table One indicates, the Law Lords made use of Hansard materials in at least one judicial opinion in 9.8 percent of the decisions issued between 1996 and 2005—58 of 591 cases. Usage has been fairly pervasive rather than being confined to a handful of individual judges. Over the ten-year period, the fifty-eight identified cases include ninety-four judicial opinions expressly invoking legislative history. Of the twenty-four Lords

& Cullen, L.JJ.) (reaching same result as Lord Steyn but without endorsing his reasoning or discussion of Hansard); *Kuddus v. Chief Constable* [2001] UKHL 29, [2001] 3 All E.R. 193 (U.K.) (Slynn, Mackay, Nicholls, Hutton & Scott, L.JJ.) (reaching same result, with Lords Slynn, Mackay, and Nicholls invoking Hansard, but with no opinion endorsing the reasoning of any other). See generally John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 489 (2001).

157. “Law Lords usage” includes any decision in which at least one judicial opinion addresses or relies upon Hansard materials. See *supra* note 79 (describing search strategy). Similarly, “Supreme Court reference” includes any decision in which at least one Justice’s opinion addresses legislative history in substantive terms. See *supra* notes 150–51 (referring to sources that describe how data sets were assembled). “Supreme Court reliance” includes only those decisions in which the Court’s majority opinion relies on legislative history to help explain or justify the holding. See *supra* notes 150–51.



of Appeal in Ordinary who served on more than fifteen panels during this period, eighteen Lords referred to Hansard in at least one judicial opinion.<sup>158</sup> Some members of the Court made greater use of parliamentary materials than others: four Lords of Appeal (Bingham, Hoffmann, Hope, and Steyn) discussed Hansard in at least nine of their opinions, and another five (Goff, Hobhouse, Hutton, Nicholls, and Slynn) referred to Hansard materials on either four or five separate occasions. In 2005, the last year covered by Table One, six of the twelve sitting Lords of Appeal invoked legislative history materials in two or more opinions.

The figures in Table One also reveal an intriguing tension between the tenor of legislative history debates in the United States and Britain on the one hand, and the reality of the two countries' legislative history usage on the other. In the United States, Justice Scalia has consistently criticized the use of legislative history as an aid to interpretation,<sup>159</sup> and he has been joined by some other prominent jurists<sup>160</sup> and legal academics.<sup>161</sup> There is considerable evidence that Justice Scalia's position has influenced the Supreme Court's use of legislative history; the Court's reliance on this interpretive resource has noticeably declined in the years since his arrival in 1986.<sup>162</sup> In Britain, *Pepper v. Hart* opened the door to legislative history

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158. Five of the six who did not refer to Hansard had two years or less of active service during this decade, and one of those (Lord Mustill, who retired in March 1997) had invoked Hansard in four opinions authored prior to 1996. In addition, two other distinguished jurists, Lord Cooke and Lord Mackay of Clashfern, who participated on Law Lords panels during this period, also invoked Hansard in their opinions. Law Lords membership for the 1996–2005 period was compiled from the respective volumes of *All England Law Reports*, which list Lords of Appeal in Ordinary (and other Lords who have held high judicial office and are eligible to hear appeals) at the front of each volume. See also Email from Helen McMurdo, Committee Assistant, Law Lords Office, to Chad Eggspuehler (Sept. 26, 2006) (on file with author). Data on Hansard references in the opinions of individual Lords of Appeal was compiled by the author, assisted very capably by Chad Eggspuehler.

159. See, e.g., *Zedner v. United States*, 126 S. Ct. 1976, 1990–91 (2006) (Scalia, J., concurring); *United States v. Estate of Romani*, 523 U.S. 517, 535–37 (1998) (Scalia, J., concurring); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 616–23 (1991) (Scalia, J., concurring); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29–37 (Amy Gutmann et al. eds., 1997).

160. See, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 219 (1994) (Scalia & Thomas, J.J., concurring); *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.); Wallace v. Christensen, 802 F.2d 1539, 1559–60 (9th Cir. 1986) (Kozinski, J., concurring).

161. See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 87–90, 102–16 (2006); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 696–706 (1997); John Copeland Nagle, *The Worst Statutory Interpretation Case in History*, 94 NW. L. REV. 1445, 1468–69 (2000).

162. See Brudney & Ditslear, *supra* note 8, at 222–24 (reporting a decline in labor and employment cases since 1985, including in opinions authored by some liberal Justices); Koby, *supra* note 8, at 384–95 (reporting a decline since the 1980s, especially in opinions authored by more conservative Justices); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 212–20 (2000) (reporting a decline from 1987 to 1994). See generally

usage starting in the early 1990s. Some legal academics and jurists have bemoaned the new propensity to refer to Hansard,<sup>163</sup> but as Table One indicates, citations to and discussions of parliamentary materials by the Law Lords have increased over the most recent five-year period.

The bottom line, however, is that the Supreme Court continues to invoke legislative history far more often than do the Law Lords, although the American dialogue has highlighted diminished usage and the British debate has focused on excessive references. From 1996 to 2005, Hansard materials were considered by at least one panel member in 9.8 percent of the 591 Law Lords decisions, whereas legislative history materials were discussed by at least one Supreme Court Justice in 48.3 percent of the 145 reviewed cases.<sup>164</sup> Even when comparing the Supreme Court's *reliance* on legislative history in majority opinions against the Law Lords' *references to* legislative history in individual judicial speeches, Supreme Court reliance over the past decade—29.0 percent of the 145 reviewed majority opinions—is roughly three times greater than the Law Lords' record of references. When the comparison is closer to apples and apples—between references to legislative history by judges on the two highest courts—that history is invoked about five times more often by the Supreme Court.

One must be careful to keep these rather dramatic differences in perspective. The overall caseload for the Law Lords is not as heavily statutory as are the tax law and workplace law decisions examined by the Supreme Court.<sup>165</sup> Accordingly, the Supreme Court cases reviewed here are somewhat more likely to trigger references to legislative history. At the same time, the 9.8 percent figure includes instances in which Hansard is referenced not for traditional statutory interpretation reasons but rather because parliamentary statements by ministers help the court to understand

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Manning, *supra* note 15.

163. See, e.g., *McDonnell v. Congregation of Christian Brothers Trs.* [2003] UKHL 63 [2004], 1 All E.R. 641, 655–56 (U.K.) (Steyn, L.J.); *Wilson v. First County Trust Ltd.* [2003] UKHL 40, [2003] 4 All E.R. 97, 130–31 (U.K.) (Hope, L.J.); *Robinson v. Sec'y of State* [2002] UKHL 32, [2002] N. Ir. L.R. 390, 404–05 (Hoffmann, L.J.); *Baker* *supra* note 4; *Marshall*, *supra* note 97; *Summers*, *supra* note 97.

164. The figure 48.3 percent is derived from the data in Table One: out of 145 Supreme Court decisions, seventy (fifty-four labor and employment and sixteen tax) referenced legislative history. Similarly, in forty-two of the 145 Supreme Court majority opinions (thirty-three labor and employment and nine tax), or twenty-nine percent, the majority author relied on legislative history.

165. The “non-statutory” component of the Law Lords docket is not as substantial in recent times as some might suppose. See *supra* note 153 (reporting that about fifteen percent of the 591 Law Lords decisions from 1996 through 2005 do not raise statutory issues). Still, this fifteen percent figure exceeds the ten percent estimate of non-statutory cases for Supreme Court labor and employment decisions. See *supra* note 153. In addition, all twenty-four Supreme Court tax decisions involve issues of statutory interpretation. See *supra* text accompanying note 153.

agency policies that are being challenged as arbitrary or fundamentally unfair.<sup>166</sup> When those references are omitted, the remaining uses of Hansard—to assist the court in construing the particular words or general purpose of the statute itself—arise in only 6.4 percent of the 591 decisions.<sup>167</sup>

It is also relevant that the Law Lords continue to cite to pre-legislative historical materials such as White Papers and commission reports as helpful in identifying the mischief behind a statute. In the United States, the primary source for such purpose-related background information is legislative history—especially committee reports.

Because White Papers and commission reports are invoked with some frequency, it seems appropriate to calculate the Law Lords' references to these pre-legislative materials over the same ten-year period. From 1996 through 2005, sixty-nine additional Law Lords decisions—11.7 percent of the total—include a judicial opinion that refers to White Papers and/or commission reports.<sup>168</sup> My summary review of these references suggests that a fair number involved merely *de minimis* mention, something that was rarely true for references to Hansard during the ten-year period.<sup>169</sup> But assuming *arguendo* that all such references are to be treated identically, the combined number of cases in which either Hansard or pre-legislative historical materials are invoked comes to 21.3 percent of the total—still less than one-half the level of Supreme Court references to legislative history.

One interesting feature of the Law Lords' use of White Papers and commission reports is that these references virtually doubled during the second half of the ten-year period—from 7.8 percent in 1996–2000 to 14.9

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166. See *supra* note 126 and accompanying text; and *infra* notes 293–94 and accompanying text.

167. Of the thirty-eight cases in which one or more panel members invoked Hansard for the traditional statutory interpretation reasons, twenty-seven cases involved references primarily related to the specific meaning of statutory words, while in eleven cases the principal focus was on the more general purpose or mischief at which the statute was aimed. See *supra* note 128 (reporting this breakdown for two sub-periods from 1996 to 2005).

168. Cases invoking White Papers or Commission Reports were identified by following the Lexis search: ((White Paper!) or (Commission w/s Report!)). After removing duplicates and false positives, the search identified 101 decisions, thirty-two of which also included one or more opinions invoking Hansard.

169. See, e.g., *Ward v. Comm'r of Police* [2005] UKHL 32, [2005] 3 All E.R. 1013, 1017 (U.K.) (Hale, B.) (briefly mentioning Royal Commission Report); *Transco v. Stockport Metro. Borough Council* [2003] UKHL 61, [2004] 1 All E.R. 589, 593 (U.K.) (Bingham, L.J.) (briefly mentioning Law Commission Report). The Law Lords' references that were more than *de minimis* were made to assist in identifying the mischief or purpose at which the statute was aimed. See, e.g., *Greenfield v. Sec'y of State for Home Dept.* [2005] UKHL 14, [2005] 2 All E.R. 240, 252–53 (U.K.) (Bingham, L.J.) (referring to White Paper); *Mark v. Mark* [2005] UKHL 42, [2005] 3 All E.R. 912, 925–26 (U.K.) (Hale, B.) (referring to Law Commission Report).

percent in 2001–2005.<sup>170</sup> Given that the proportion of decisions with Hansard references more than doubled during this same decade—from 5.6 percent in 1996–2000 to 13.4 percent in 2001–2005—it would appear that the Law Lords are investing more time and thought generally in the interpretive potential of historical materials related to the legislative process.

I explore some implications of this apparent trend in Part III. Meanwhile, however, the gap between current legislative history usage by the Supreme Court and the Law Lords remains substantial and warrants some attempt at explanation.

### *B. Similar Rationales for Valuing Legislative History*

Before suggesting factors that account for the sharp differences in legislative history usage between the Law Lords and the Supreme Court, it is worth noting that there are important similarities in their approaches as well. Legislative history advocates on the two Courts have adopted much the same basic justifications for valuing that history as an interpretive asset. As part of this support, legislative history proponents have responded in analogous terms to certain practical and conceptual objections voiced by critics in both countries.

In *Pepper v. Hart*, Lord Browne-Wilkinson reasoned that allowing courts to rely on parliamentary materials as an aid to construing ambiguous text would help enforce Parliament's true intent and thereby strengthen legislative supremacy.<sup>171</sup> Applying the new rule of *Pepper* to the facts at hand, he further concluded that the exchanges between the minister and members of Parliament were sufficiently prominent, clearly articulated, and contextually persuasive to justify attributing to Parliament as a whole the understanding and intent expressed by the minister.<sup>172</sup>

The principle of reasonably imputed institutional approval is also central to judicial rationales for relying on legislative history in the Supreme Court setting. Justice Stevens, referring to Congress's committee-based system of drafting and commenting on bills, has

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170. If one includes the thirty-two decisions in which the Law Lords invoked both Hansard and pre-legislative materials, there is a parallel increase for the larger group of 101 cases—from 11.2 percent in 1996–2000 to 22.0 percent in 2001–05.

171. See *supra* text accompanying notes 52–53.

172. See *supra* text accompanying notes 70–73; see also *Regina v. Sec'y of State for the Env't, Transp. & Regions ex parte Spath Holme Ltd.*, [2001] 1 All E.R. 195, 216 (H.L. 2000) (U.K.) (Nicholls, L.J.) (discussing use of contextual materials, including legislative history, to aid in the judicial task of reasonably imputing intent to Parliament).

concluded that busy representatives and senators may appropriately be deemed to have relied on committee reports and the explanations contained therein to help capture the meaning or implications of the text on which they have voted.<sup>173</sup> Justice Stevens has further observed that a failure by the Court to infer congressional approval from suitably prominent and well-reasoned legislative history ignores persuasive evidence of congressional intent and disrespects the lawmaking supremacy accorded to the legislative branch.<sup>174</sup>

Similarly, Justice Breyer and Justice Souter each have maintained that identifying a statute's underlying purpose—very often with the help of legislative history—can provide essential guidance as to the meaning of enacted text.<sup>175</sup> That purpose too is imputed on the basis of what a reasonable member of Congress would have had in mind.<sup>176</sup> The purposive approach to statutory interpretation has long been embraced by British courts as well,<sup>177</sup> and the Court in *Pepper* relied on Hansard's role in enabling it to discern legislative purpose as part of its justification for admitting parliamentary materials.<sup>178</sup>

One additional dimension of each Court's rationale for using legislative history is that its supporters regard this resource as clarifying or probative rather than conclusive. Proponents acknowledge that there are risks of misuse and that legislative history is not binding on a court reviewing the meaning of text. At the same time, incidents of misuse are viewed as

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173. See *Bank One Chic., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276–77 (1996) (Stevens, J., concurring). This has been referred to as the “busy Congress” rationale. See Tiefer, *supra* note 162, at 209, 252–53.

174. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting).

175. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 85–88 (2005); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 516 n.8 (1992) (Souter, J.) (plurality opinion).

176. See BREYER, *supra* note 175, at 88, 93–94.

177. See, e.g., *Regina v. Z.* [2005] UKHL 35, [2005] 3 All E.R. 95, 109 (U.K.) (Woof, L.J.); *Pepper v. Hart*, [1993] 1 All E.R. 42, 64–65, 71 (H.L. 1992) (U.K.) (Browne-Wilkinson, L.J.). See generally Zenon Bankowski & D. Neil MacCormick, *Statutory Interpretation in the United Kingdom*, in *INTERPRETING STATUTES: A COMPARATIVE STUDY* 359, 367 (D. Neil MacCormick & Robert S. Summers eds., 1991); Robert G. Vaughn, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 *IND. INT'L & COMP. L. REV.* 1, 26–28 (1996).

178. See *supra* text accompanying note 54. For a thoughtful discussion of how intent is imputed to legislatures and other group actors on philosophical and linguistic grounds, see Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 *GEO. L.J.* 427, 437–53 (2005); see also Vaughn, *supra* note 177, at 40–41 (contending that legislative history reliance to help identify purpose constrains judicial discretion by inhibiting judges from letting their own preferences “masquerade[e]” as those of Parliament); Stephen F. Ross & Daniel Tranan, *The Modern Parol Evidence Rule and its Implications for New Textualist Statutory Interpretation*, 87 *GEO. L.J.* 195, 198 (1988) (contending that extrinsic evidence will mitigate, not aggravate, judicial bias in the area of contract interpretation).

anecdotal rather than systemic; accordingly, reservations about reliance on legislative history are properly understood as going to the weight ascribed to such history in a given setting, not its admissibility in some larger sense.<sup>179</sup>

Apart from sharing basic rationales, legislative history proponents in Britain and the United States have had to respond to similar concerns about its utility and legitimacy. A major practical objection voiced on both sides of the Atlantic involves difficulties of access for practicing attorneys and others seeking to understand and comply with the law. The court in *Pepper* acknowledged this concern but concluded that it would have minimal impact. The lead opinion asserted that projected research costs were exaggerated and observed that attorneys and their clients were adequately managing the analogous logistical and financial challenge of gaining access to often obscure agency regulations.<sup>180</sup>

In the United States, Justice Jackson expressed similar concerns about lack of access to legislative history in a 1953 Supreme Court case.<sup>181</sup> These concerns, however, appear to have been overstated even then, at least with regard to congressional committee reports and floor debates.<sup>182</sup> Moreover, access to legislative history is even less problematic today given online capabilities available through Westlaw and Lexis, and also non-fee services.<sup>183</sup> Cost remains a relevant factor, but as with *Hansard*, the expenses involved in securing access to legislative history are perceived as not materially different from the costs associated with reviewing or monitoring agency regulations.<sup>184</sup>

179. See, e.g., *Regina v. Sec'y of State for the Env't Transp. & Regions ex parte Spath Holme Ltd.*, [2001] 1 All E.R. 195, 218 (H.L. 2000) (U.K.) (Nicholls, L.J.), 223 (Cooke, L.J.); *Nat'l Fed'n of Fed. Employees v. Dep't of the Interior*, 526 U.S. 86, 96 (1999) (Breyer, J.). See generally Vogenauer, *supra* note 4, at 658–65; James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 49–56, 58–59 (1994).

180. See *supra* text accompanying notes 56–57.

181. See *United States v. Pub. Util. Comm'n*, 345 U.S. 295, 319–21 (1953) (Jackson, J., concurring).

182. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1247–52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (noting that at the time there were three or more depository libraries for U.S. government documents in every state, and that committee reports as well as the *Congressional Record* were routinely collected in these libraries).

183. For example, committee reports are available from 1995 onward, and the *Congressional Record* is available from 1989 onward, at Thomas, Library of Congress, <http://thomas.loc.gov/> (last visited May 15, 2007). Reports and floor debates from 1994 onward are also available through the U.S. Government Printing Office website, GPO Access Home Page, <http://www.gpoaccess.gov/> (last visited May 15, 2007).

184. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 868–69 (1992). Related to concerns about access, critics in both countries have

Admittedly, electronic access may be somewhat more problematic with respect to Hansard than for core legislative history materials in the United States. Parliamentary debates and proceedings are not available online as far back as the U.S. materials, nor can they be searched as efficiently as can House and Senate committee reports and the *Congressional Record*.<sup>185</sup> On the other hand, Britain is roughly one-fortieth the size of the United States,<sup>186</sup> and attorneys in Britain generally will not have to travel as far as their American counterparts to locate basic legislative history materials in hard-copy form.

An often-voiced conceptual criticism of reliance on legislative history is that it wrongly presumes the existence of a coherent legislative intent. The concern is both that collective entities such as Parliament and Congress are not capable of having a single or uniform intention and that even if such an intention could be hypothesized, it could not be sensibly extrapolated from isolated fragments of the legislative record.<sup>187</sup> For present purposes, it is not necessary to evaluate these criticisms of intentionalism other than noting that legislative history advocates in both countries have essentially responded to them in the same ways.

Proponents on the Supreme Court and the Law Lords have endorsed the view that the legislative process possesses a baseline measure of

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expressed concern that judges would not be sophisticated enough to sift through legislative history and accurately discern the implications of various statements or exchanges. *See supra* text accompanying note 58 (referring to British concern); *Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 21–22 (1990) [hereinafter *Stat. Interp. Hrg.*] (statement of Judge James L. Buckley) (presenting American concern). Legislative history advocates have basically dismissed these concerns as overstated, again noting that judges must separate wheat from chaff with respect to other contextual resources as well. *See, e.g.*, *Pepper v. Hart*, [1993] 1 All E.R. 42, 66 (H.L. 1992) (U.K.); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 287 (1995).

185. Hansard is available back to the 1988 session at United Kingdom Parliament, Hansard (Debate), <http://www.publications.parliament.uk/pa/pahansard.htm> (last visited May 15, 2007). The site has a search feature and makes the Daily and Bound Volume Index available for particular sessions. Relevant debates may be located by searching for the speaker (if known) or subject terms. In the United States, Westlaw provides the *U.S. Code Congressional & Administrative News* (U.S.C.C.A.N.) online back to 1948, allowing access to key committee reports and *Congressional Record* references accompanying enacted bills. In addition, the *Congressional Record* is available on Westlaw and Lexis Nexis from 1985 forward, committee reports are available from 1990 forward, and committee hearings are available from 1993–94 forward. Using the CIS/Index, a comprehensive list of legislative history documents can be generated by searching with the bill number. The CIS/Index also can be searched by key word and speaker.

186. *See* THE WORLD ALMANAC AND BOOK OF FACTS 2005, at 841, 843 (William A. McGeeveran, Jr. et al. eds., 2006 ed.) (reporting that Britain comprises 94,525 square miles and the United States 3,718,709 square miles).

187. For some discussion of the argument against intentionalism in the British setting, see Vogenauer, *supra* note 4, at 632–33, 655, and sources cited therein. For discussion of the same argument in the American context, see Manning, *supra* note 161, at 684–89, and sources cited therein.

coherence. They accept at least implicitly that legislators who agree a certain text should become law are able to reach a broadly shared understanding of the purpose(s) leading to a bill's introduction and enactment, and they are further willing to infer that these same legislators may at times adopt a common perspective on the meaning and implications of certain specific provisions.<sup>188</sup> Whether statements found in Hansard or congressional materials should be sensibly construed as part of such a common perspective depends on the identity of the speaker, the nature and visibility of his presentation, the reasoned elaboration contained in his remarks, and other factors that will vary from one statutory setting to the next. Thus, proponents would argue, the challenge of deriving persuasive evidence of intent from various pieces of the legislative history record is a practical problem, not a conceptual one.

Finally, there is a persistent separation of powers objection to legislative history in both legal cultures: it is illegitimate to allow the unenacted intentions of legislators to trump the authority of enacted text or to usurp the interpretive role of courts.<sup>189</sup> Once again, the responses given by the court in *Pepper* parallel those propounded in the United States. Legislative history, like other contextual resources, plays a supplemental role in that it helps attribute meaning to the actual statutory language. A court's reliance on this history to understand what Congress or Parliament has enacted is no more a usurpation of the judicial role than is reliance on canons of construction, the dictionary, or prior agency interpretive practice.<sup>190</sup>

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188. See, e.g., *Pepper*, [1993] 1 All E.R. at 71 (Browne-Wilkinson, L.J.); *Reg. v. Sec'y of State for the Env't Transp. & Regions ex parte Spath Holme Ltd.*, [2001] 1 All E.R. at 219–23 (H.L. 2000) (U.K.) (Cooke, L.J.); *supra* notes 173–76 (statements of Justices Stevens, Breyer, and Souter). For commentary from scholars in both countries supporting the view that legislation is a fundamentally purposive or intentional enterprise, see, for example, Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 257–68 (Robert P. George ed., 1996); Stefan Vogenauer, *What is the Proper Role of Legislative Intention in Judicial Interpretation?*, 18 *STATUTE L. REV.* 235, 237–41 (1997); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 *CASE W. RES. L. REV.* 179, 195–96 (1986); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 *U. CHI. L. REV.* 636, 649 (1999).

189. See, e.g., discussion of *Pepper* *supra* text accompanying note 25; *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 *DUKE L.J.* 371, 375–76 (1987).

190. See, e.g., *Pepper*, [1993] 1 All E.R. at 69; *Stat. Interp. Hrg.*, *supra* note 184, at 6–7, 18–19 (statement of Judge Patricia Wald).



### *C. Key Differences in Legislative Process and Structure*

The similarities in certain basic rationales and responses summarized above contribute to an understanding of why the highest Courts in both Britain and the United States value legislative history as an interpretive resource. There are, however, a number of important differences between the two countries in terms of legislative processes and structures. Notably, in contrast to Britain's parliamentary system, the congressional lawmaking enterprise confers a central role on standing committees, it regularly requires negotiation and compromise to achieve success, and it includes multiple decisional moments captured by distinct forms of internal commentary. These differences—separately explored below—help account for why Supreme Court reliance on legislative history is more robust than that of the Law Lords.

#### *1. Standing Committees and Committee Reports*

Among legislative history proponents in the United States, committee reports are regarded as especially useful in shedding light on the meaning or implications of inconclusive text. Most legislation is written in standing committees whose members remain affiliated from one Congress to the next and develop a level of expertise over subject areas within their ongoing jurisdictional ambit. Through formal hearings and executive sessions, and informal discussions and negotiations, committee members and committee staffs devote substantial time and energy to considering the problems the proposed law is supposed to address and how best to address them. Committee reports tend to reflect this level of consideration, offering both an overview of the policy need or “general purpose” behind the legislation and also an analysis of how various sections or provisions would implement the statute’s “specific intent” in different factual and legal settings.<sup>191</sup>

In addition to being well informed, committee reports are also regarded as highly accessible due to a format that is orderly and understandable to other members, to the courts, and to the broader legal community. Reports typically set forth a policy or problem that has given rise to the need for new legislation and then describe the solution proposed by the new law, highlighting features that respond to particular issues or concerns. They

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191. See WILLIAM N. ESKRIDGE JR., PHILIP FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 311 (2d ed. 2006); WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION* 479 (4th ed. 2005).

also frequently include additional or minority views, enabling committee members who oppose all or part of the proposed solution to present their competing concerns in some depth.<sup>192</sup>

Senators and congresspersons have extolled the educative virtues of committee reports, both as members of the majority party and as the opposition. These legislators have analogized the report to the road map or “bone structure” of a statute, praising the report’s “central explanatory function” and its role in helping to address ambiguities in the text.<sup>193</sup> Even members of the minority have often looked to committee report explanations to understand what they were voting on,<sup>194</sup> to help focus generally worded statutory text, or to prevent “slippage” from agreements reached among key legislators.<sup>195</sup>

Although committee reports as aids to statutory interpretation have certain limits,<sup>196</sup> their status as the best informed and most accessible category of legislative history has led federal courts to turn to them first and foremost for guidance. Thus it is not surprising that of the forty-two Supreme Court decisions between 1996 and 2005 in tax law and labor and employment law that actually relied on legislative history, the legislative history deemed persuasive included committee reports some three-fourths of the time.<sup>197</sup>

Committee reporting does not play the same role at all in the British legislative process. Standing committees in the House of Commons examine bills on a clause-by-clause basis, but this examination occurs

192. See, e.g., S. REP. NO. 101-263, at 1 (1990) (presenting table of contents for Senate committee report accompanying the Older Workers Benefit Protection Act of 1990); POPKIN, *supra* note 191, at 479 (describing standard, readily identifiable features of committee reports).

193. Abner J. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 184 (1986); see also *Stat. Interp. Hrg.*, *supra* note 184, at 2 (statement of Representative Kastenmeier) (asserting, on behalf of “most” members, that committee reports can “explain and amplify” legislative language in ways that are instructive to the courts).

194. *Stat. Interp. Hrg.*, *supra* note 184, at 21 (statement of Judge James L. Buckley).

195. See generally *id.* at 65 (statement of Representative Moorhead); Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL’Y 43, 46–48 (1988).

196. Sometimes a report is irrelevant, as when a key provision has been added on the floor following committee deliberations. Other times the report is as ambiguous or incomplete as the statutory text.

197. See Table One, *supra* text accompanying note 157 (reporting Supreme Court reliance in thirty-three labor and employment decisions and in nine tax decisions). The Court’s majority opinion relied on committee reports to help explain or justify the holding in twenty-five of thirty-three labor and employment cases that relied on legislative history and in six of nine tax cases. By contrast, the Court relied on hearings or floor debates in roughly one-third of these decisions: fourteen of thirty-three labor and employment cases, and one of nine tax cases. See also Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 tbl.II (1982) (reporting that for an earlier period, one-half of all Supreme Court references to legislative history were to committee reports).

after full House debate on the bill as a whole on second reading.<sup>198</sup> Importantly, committee review of bill sections or clauses takes place only once the bill has received approval in principle from the House, whereas in Congress committee review and approval are presumptive preconditions to endorsement by the full chamber. In addition, British standing committees are identified simply by a letter designation (e.g., A to H); they are not assigned particular subject matter jurisdictions, and members are selected to serve for each new bill.<sup>199</sup> Accordingly, British committees lack the collective continuity and substantive competence that characterize standing committees in Congress.<sup>200</sup>

Consistent with the differences between committees in terms of their cohesiveness, subject matter expertise, and basic function, the work products of parliamentary standing committees bear little resemblance to House and Senate committee reports. A British standing committee does not issue a detailed report that sets forth the bill's purpose, summarizes the legal implications of various provisions, or recounts policy disagreements between bill supporters and opponents. Instead, the committee work product is typically a transcript of the meetings at which a clause-by-clause review occurred, reporting particular amendments that were moved, accepted, or withdrawn.<sup>201</sup> This recounting of bill modifications, along with question-and-answer exchanges between individual committee members and the government's designated representative, can sometimes shed light on the meaning of a word or phrase in text, in much the same way as can the similar record of amendments and exchanges that occurred in the House as a whole.<sup>202</sup> But the record of committee proceedings does not offer a coherent explanation for the bill or an analysis of its key

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198. See ZANDER, *supra* note 7, at 53–54.

199. See *id.* at 54 & n.6; H.C. Info. Office, *Factsheet L1: Parliamentary Stages of a Government Bill*, 2007, at 4, <http://www.parliament.uk/documents/upload/L01.pdf>.

200. See generally H.C. Info. Office, *Factsheet L6: General Committees*, 2006, at 3–5, <http://www.parliament.uk/documents/upload/106.pdf>. The 1969 report of the Law Commissions recognized that congressional committee reports provide a richer deliberative perspective than is available under Britain's committee report proceedings. See THE INTERPRETATION OF STATUTES, *supra* note 29, at 34, 38.

201. See *Factsheet L6*, *supra* note 200, at 5–7. See as examples House of Commons Standing Committee A 2005–06, Animal Welfare Bill Report of Proceedings, in 441 PARL. DEB., H.C. (6th Ser.) (2006) 291; House of Commons Standing Committee A 2005–06, National Lottery Bill Report of Proceedings, in 438 PARL. DEB., H.C. (6th Ser.) (2005) 235. These reports are available at U.K. House of Commons, Public Bill Committees, <http://www.publications.parliament.uk/pa/cm/stand.htm> (last visited May 15, 2007).

202. Indeed, *Pepper* itself involved cites to exchanges between the Financial Secretary and standing committee members that were reproduced in Hansard. See *supra* text accompanying notes 70–72.

provisions and their policy implications. Nor is this committee document made available to other legislators and their staffs prior to the initial decision to approve, modify, or reject the bill as written.

As noted earlier, one member of the Law Lords who harbors grave reservations about judicial use of Hansard has urged that each bill be accompanied by detailed explanatory memoranda patterned on congressional committee reports, and he intimated that courts could properly rely on such legislative materials.<sup>203</sup> Since 1999, most public bills have been accompanied upon introduction by brief explanatory notes drafted by the government department responsible for the legislation.<sup>204</sup> Unlike congressional committee reports, explanatory notes are neither prepared nor promoted from within the legislature. Largely for this reason, the leading judicial critic of Hansard regards the new explanatory notes in the same way he assesses other ministerial statements.<sup>205</sup> Meanwhile, in light of the considerable differences in standing committee work products, a primary source of reliable legislative history in the American context is simply missing from the British setting.

## 2. *Compromise and Change During the Legislative Process*

The committee report distinctions just described are part of a larger difference between Britain and the United States in terms of how statutes are produced. In Britain, the lawmaking process is basically linear and efficient. The government exercises control throughout, and participation by legislators on the floor or in standing committee generally has little substantive impact.<sup>206</sup> The government conceives of and introduces virtually all public bills.<sup>207</sup> The opposing party accepts a considerable amount of government legislation at second reading.<sup>208</sup> There may then be

203. See *supra* text accompanying note 104 (discussing recommendation by Lord Millett).

204. See *Westminster County Council v. Nat'l Asylum Support Serv.* [2002] UKHL 38, [2002] 4 All E.R. 654, 656–57 (Steyn, L.J.) (describing new practice).

205. See *id.* (discussing explanatory notes as useful for identifying the mischief at which the law is aimed and in exceptional cases for estoppel against the executive, but never as reflecting the will of Parliament with regard to the meaning or scope of statutory language).

206. See, e.g., RICHARD CROSSMAN, *THE DIARIES OF A CABINET MINISTER: VOLUME ONE* 628–29 (1975); Douglas Hurd, *The Present Usefulness of the House of Commons*, 3 J. LEGIS. STUD. 1, 2–3 (1997).

207. See generally MARTIN PARTINGTON, *AN INTRODUCTION TO THE ENGLISH LEGAL SYSTEM* 40 (3d ed. 2006); SLAPPER & KELLY, *supra* note 20, at 58–60.

208. See ZANDER, *supra* note 7, at 81 (reporting bipartisan support for half of the government's bills and vote by division on second reading in only twenty percent of government bills during the 1970–74 period); see also CATHERINE ELLIOTT & FRANCES QUINN, *ENGLISH LEGAL SYSTEM* 35–36 (7th ed. 2006) (discussing how the whip system virtually ensures that a government with a reasonable

amendments offered seeking to clarify or refine particular bill clauses or sections, but Parliament is extremely unlikely to approve them if they are offered by opposition members or even by government backbenchers.<sup>209</sup>

Because the government enjoys majority support in Parliament for its legislative program and traditionally imposes tight party discipline, there is rarely a need for it to negotiate or modify its original position. In the House of Commons, the government as bill manager is most concerned with pushing the bill through to enactment and is likely to resist merits-based changes due to time constraints and related concerns about legislative derailment.<sup>210</sup> Government-drafted amendments are accepted, but these usually result from subsequent thinking or planning by civil servants (perhaps stimulated by interest groups) rather than compromises or changes proposed by legislators.<sup>211</sup>

The controlled and efficient process by which bills are introduced and enacted in Parliament has repercussions for the utility of legislative history. Bills that become public laws generally originate from within government departments or derive from recommendations made by independent commissions or advisory committees.<sup>212</sup> The purpose behind these bills—the mischief at which they are aimed—is typically set forth in some depth through government consultative documents such as White Papers or through commission reports.<sup>213</sup> The presence of such abundant pre-legislative materials means that a minister's statement in committee or on the floor, explaining the bill's purpose or the underlying mischief, is less likely to add substantial information or policy analysis that is new or otherwise unavailable.

Parliamentary debate about proposed or accepted amendments does produce information that is apt to illuminate textual meaning in ways not expressed in other government documents. Major substantive amendments are not, however, a regular part of the parliamentary enterprise. The government, which is the only legislative player likely to have such major amendments accepted, has little incentive to offer them. Ministers steering

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majority will get its legislation through on second reading).

209. See ZANDER, *supra* note 7, at 82 (reporting an eleven percent success rate for backbencher amendments and a five percent rate for opposition members; ninety-five percent of amendments moved successfully in the House of Commons were so moved by ministers).

210. See Hurd, *supra* note 206, at 2.

211. See ZANDER, *supra* note 7, at 82. See generally PARTINGTON, *supra* note 207, at 45.

212. See DJ GIFFORD & JOHN R. SALTER, UNDERSTANDING THE ENGLISH SYSTEM 17–18 (1997); ZANDER, *supra* note 7, at 2–3. A smaller number of public laws stem from the ruling party's election manifesto commitments or are in response to unexpected events in the public arena. See GIFFORD & SALTER, *supra*, at 18; ZANDER, *supra*, at 2.

213. See *supra* text accompanying notes 20–21 and 54.

a bill through Parliament seldom view themselves as having to compromise or make significant textual modifications in order to prevail. Accordingly, the record of parliamentary debates and proceedings contains relatively few instances in which legislative history can illuminate the meaning of substantially revised or newly forged statutory text.

Parliamentary exchanges can shed light on the understandings or implications surrounding more minor textual adjustments.<sup>214</sup> This indeed was the situation in *Pepper*, where the Finance Minister explained a government decision—made under pressure from backbenchers—to withdraw an amendment that would have taxed in-house benefits at higher rates.<sup>215</sup> Moreover, even in an efficient legislative environment, the ambiguities inevitably associated with complex statutory language (often drafted under time pressures) allow for legislative history to play some clarifying role.<sup>216</sup> Still, the dearth of large-scale bargaining or compromise as part of the legislative process diminishes the explanatory value of parliamentary narrative accompanying that process.

In the United States, by contrast, due to formal divisions in power between the executive and legislative branches, as well as relatively lax party discipline and various procedural obstacles within Congress, most major bills that become public laws undergo considerable change from introduction to final enactment. For a start, bill introduction in Congress is not part of an organized or systemic government program. The executive branch plays an important role in the development of many bills, but it is far from the exclusive initiating actor and may not even be the primary influence during periods when Congress and the presidency are controlled by different parties.<sup>217</sup>

Both bill introduction and legislative agenda formulation in the United States are highly decentralized, shaped by committee chairs who function as independent policy entrepreneurs, by private interest groups that invest heavily in the re-election campaigns of individual members, and by state and local governments that exert special influence associated with their separate sovereign status.<sup>218</sup> Party leadership in both chambers labors with

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214. See, e.g., *In re R.* [2005] UKHL 33, [2005] 4 All E.R. 433, 437 (U.K.) (Hope, L.J.); *Regina v. Preddy*, [1996] 3 All E.R. 481, 487–88 (H.L. 1996) (U.K.) (Goff, L.J.).

215. See *Pepper v. Hart*, [1993] 1 All E.R. 42, 70 (H.L. 1992) (U.K.).

216. See *id.* at 64; ZANDER *supra* note 7, at 21–24; Hurd, *supra* note 206, at 1–2.

217. Between 1968 and 2006, at least one chamber of Congress was controlled by a party other than that of the President for more than two-thirds of the time—all years except 1977–80, 1993–94, several months in 2001, and 2003–06.

218. See generally JAMES MACGREGOR BURNS ET AL., *GOVERNMENT BY THE PEOPLE* 229, 353–61 (16th ed. 1995); ALAN GRANT, *THE AMERICAN POLITICAL PROCESS* 45–52, 65–66, 302 (5th ed.

some success to classify and channel the cascade of bills that are introduced and emerge from committee. Nonetheless, decision making in the American legislative process is best viewed as dynamic and discontinuous rather than static or linear; a leading observer's depiction of Congress as "organized anarchy"<sup>219</sup> aptly captures this reality.

The value attached to inefficiency in the congressional lawmaking model is further attributable to the range of procedural constraints that allow a determined minority to delay or obstruct legislation. Some of these constraints are constitutionally explicit, although many are not.<sup>220</sup> When combined with the tumultuous nature of agenda-setting and the finite amount of time available, procedural obstacles effectively invite the formation of majority coalitions that can negotiate compromises in text at various stages of the process. Many bills—especially if complex or controversial—are substantially modified or recast from their original form to accommodate the priorities of wavering colleagues or to co-opt segments of the opposition. Alterations often take place in one or both chambers through the committee process or on the floor during full debate; they also occur in conference when substantive differences must be reconciled.

The baseline inefficiencies of Congress's lawmaking process generate an added dimension to the value of legislative history in the U.S. setting. Because substantial adjustment and compromise in text following a bill's introduction is the rule rather than the exception, committee or floor commentaries that accompany the particular stages of language modification are capable of shedding light on whatever qualitative changes have taken place. Legislative deals and bargains are a well-recognized feature of American lawmaking, and in the face of text that is ambiguous or incomplete, legislative history may illuminate the existence of a compromise or help to explain certain subtle aspects of the bargain. Several examples from relatively recent Supreme Court case law indicate the Court's appreciation for how legislative history plays these roles.

In a 1985 decision addressing whether the fiduciary to an employee benefit plan could be held liable for extra-contractual damages under

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1994).

219. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 84–86 (2d ed. 1995).

220. Examples of procedural constraints not specified in the Constitution include committee referral and markup, floor debate and amendment, control of the Rules Committee by the House, filibusters in the Senate, and reconciliation between two versions of a bill through conference. *See generally Standing Rules of the Senate* (2007); *Rules of the House of Representatives* (2007). For an example of constraints specified in the Constitution, see U.S. CONST. Art. I, § 7, cl. 2 (describing bicameralism, presentment, and supermajority needed to override a presidential veto).

ERISA,<sup>221</sup> the Court relied in part on legislative history to hold that Congress had not intended to authorize any remedies other than through the plan itself.<sup>222</sup> Justice Stevens, for the majority, emphasized that the broad statutory relief described in the Senate committee report differed from the bill version passed by the House, and that the compromise reached in conference followed the House approach.<sup>223</sup>

A similar instance of invoking legislative history to help establish the existence of a compromise occurred in a 1985 decision reviewing whether the Environmental Protection Agency was prohibited from issuing certain pollutant discharge waivers under the Clean Water Act.<sup>224</sup> Justice White, for the majority, noted that an early version of the bill had proposed banning the waivers and that the version of the text negotiated by the House and the Senate was inconclusive. The majority then relied on the House manager's explanation of the negotiated conference version to his colleagues on the House floor in determining that Congress had not meant to include the waivers as part of the final statutory deal.<sup>225</sup>

The Court also uses legislative history to help discern subtle dimensions of a legislative bargain. A 1994 decision construing Title VII of the Civil Rights Act relied on legislative history to establish that supporters and opponents had in effect agreed to disagree on whether the highly contentious 1991 amendments to Title VII should be applied retroactively.<sup>226</sup> Based on an elaborate review of earlier bill versions and Senate floor debates—indicating that no deal had been reached on the controversial retroactivity issue—Justice Stevens, for the Court, went on to hold in favor of the traditional presumption against retroactivity, noting the absence of congressional intent to overcome that presumption.<sup>227</sup>

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221. ERISA is the Employee Retirement Income Security Act of 1974, codified at 29 U.S.C. §§ 1001–1461 (2000).

222. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145–46 (1985).

223. *Id.* For another ERISA example, see *Laborers Health Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 547–49 (1988) (relying on floor debate to help establish that Congress did not legislate as protectively as employees contended).

224. See *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116 (1985).

225. See *id.* at 126–27. For another Clean Water Act example, see *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 315–20 (1982) (relying on committee report to help clarify that Congress established a permit system as middle ground solution given “the impracticality of any effort to halt all pollution immediately”).

226. See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

227. See *id.* at 250–63. For another example under federal anti-discrimination law, see *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 178–80 (1989) (relying on legislative history of 1967 Age Discrimination in Employment Act to construe an employer exemption that reflected a compromise among competing congressional goals).



The examples reviewed here are not meant to suggest that legislative history commentary is essential to identifying the existence or contours of compromises reached during lawmaking. Negotiated final arrangements are at times discernible from textual analysis,<sup>228</sup> and in any event not all legislative history accurately captures the essence or fine points of these arrangements. What matters for comparative purposes is that substantial textual change is a regular feature of the congressional lawmaking process in a way that differs fundamentally from the British parliamentary experience, and that this difference has consequences for the utility of legislative history.

To be sure, compromise on basic policy choices and implementation strategies does occur in Britain, but differences typically are resolved before bill language is made public—through debate within a law reform commission, the upper levels of a government ministry, or the Prime Minister’s inner circle.<sup>229</sup> Given the emphasis on pre-legislative negotiation, it is entirely rational for British courts to refer regularly to commission reports and White Papers, as noted in Part II.A above. By contrast, our system relies far more heavily on compromise following bill introduction. Divisions of power between Congress and the President, and between the House and Senate, encourage negotiations at various stages of a bill’s progression, and legislative history associated with these different stages may well capture important dimensions of any deals that are struck. Accordingly, it is not surprising that the Supreme Court recognizes and relies on such history to help understand post-introduction legislative bargains, something that the Law Lords are far less likely to have to consider given the dynamics of the parliamentary process.

### *3. Singular Versus Diverse Sources of Legislative History*

The dominant role played by the executive branch in the British lawmaking process has additional implications with respect to judicial use of legislative history. Prior to *Pepper*, some opponents of legislative history voiced the concern that, if interpretive resources were to include parliamentary statements by ministers, courts would in effect be redistributing power from the legislative branch to the executive by allowing ministerial commentary to influence the meaning of enacted

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228. See generally John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 71, 76–79 (2006).

229. See *supra* text accompanying notes 212–13.

text.<sup>230</sup> The court in *Pepper* did not explicitly address this particular separation of powers concern.<sup>231</sup> The decision to admit ministerial statements, however, effectively implies that the Law Lords found any risks of executive branch interference with parliamentary sovereignty to be outweighed by the benefits of having access to potentially enlightening explanatory materials. Deferring for the moment whether the executive branch is likely to exploit this new resource,<sup>232</sup> it is worth noting that the test set forth in *Pepper* restricts judicial access to legislative history by making ministerial participation virtually an essential component of what is admissible.

With respect to the different uses of legislative history sanctioned by *Pepper* and subsequent decisions, ministerial presentations are necessary when seeking a clearer understanding of the government's own policy that is being subjected to judicial review.<sup>233</sup> Ministerial statements are obviously important in other judicial review contexts as well, such as in identifying the mischief at which the statute is aimed and shedding light on the meaning of particular words or phrases in text. It is conceivable, however, that exchanges among backbenchers or opposition members could also offer probative evidence in these latter settings even without participation by a government representative.

The Law Lords have on rare occasions referred to non-ministerial exchanges during parliamentary debate as aids to construing the meaning of text.<sup>234</sup> Still, the expectation in light of *Pepper* is that ministerial statements are centrally important,<sup>235</sup> and the Law Lords invoke such statements in almost all instances, usually with little or no reference to contextual remarks by ordinary legislators.<sup>236</sup> This limitation on the sources of validly admissible legislative history means that only a subset

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230. See Bankowski & MacCormick, *supra* note 177, at 381; see also Styles, *supra* note 4, at 155–57 (raising same concern in immediate aftermath of *Pepper*).

231. Lord Browne-Wilkinson addressed a different separation of powers concern, namely that admitting parliamentary commentary in court would impinge on the interpretive powers of the judiciary. See *supra* text accompanying note 61.

232. See *infra* Part II.C.4.

233. See *supra* notes 36–37, 124 and accompanying text (discussing opinions in *Brind* and *Wilson*).

234. See, e.g., *Regina v. Preddy*, [1996] 3 All E.R. 481, 487–88 (H.L. 1996) (U.K.) (Goff, L.J.) (relying on statements from two members of the House of Lords); *Stubbings v. Webb*, [1993] 1 All E.R. 322, 329 (H.L. 1992) (U.K.) (Griffiths, L.J.) (relying on statements from proposer of bill, a backbencher).

235. See *Pepper v. Hart*, [1993] 1 All E.R. 42, 64, 67 (H.L. 1992) (U.K.).

236. See, e.g., *Anderson v. Sec'y of State for the Home Dep't* [2002] UKHL 46, [2002] 4 All E.R. 1089, 1093–96 (U.K.); *Regina v. Ministry of Def. ex parte Walker*, [2000] 2 All E.R. 917, 920–21 (H.L. 2000) (U.K.).

of parliamentary debates and proceedings is available for judicial reference.

By contrast, the universe of legislative history sources to which courts have access in the U.S. setting is considerably broader. The executive branch regularly contributes to the creation of legislative history as part of its role in the lawmaking process. Contributions occur primarily through testimony at committee hearings but also through memoranda or statements placed in the *Congressional Record* as attachments to floor remarks by a leading bill advocate or opponent.<sup>237</sup> As previously discussed, however, the executive branch is often not the most influential actor in legislative proceedings; multiple members of Congress typically play important roles in the various stages of moving a bill to final enactment.

There are innumerable occasions on which legislative history sources unrelated to executive branch participation may be deemed to help clarify the meaning of enacted text. For instance, when a congressional committee has eliminated bill language that would have supported one party's claims, the Supreme Court, when interpreting the statute, may well invoke this change based on its presumption that Congress does not intend to enact language it has earlier deleted.<sup>238</sup> Similarly, when bill sponsors and supporters describe a provision's principal aim during floor debate, such evidence of purpose may lead the Court to conclude that a permissible reading of text is also the correct reading.<sup>239</sup>

Even if a bill changes very little from introduction to passage, there are distinct decisional moments when legislative history can help narrate or explain what has occurred. Committee reports, floor colloquies reflecting shared understandings, floor statements from managers on both sides of the aisle, and conference reports all can shed light on the meaning of text. Given this range of sources, the Supreme Court simply has more types of legislative history material on which to consider relying than does its British counterpart.

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237. See, e.g., *Bankamerica Corp. v. United States*, 462 U.S. 122, 134–35 (1983) (analyzing executive branch testimony at House committee hearing); *Landgraf v. USI Film Products*, 511 U.S. 244, 262 & n.15 (1994) (discussing “interpretive memorandum” prepared with executive branch input and introduced on floor by bill sponsors).

238. See *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001).

239. See *West v. Gibson*, 527 U.S. 212, 218–20 (1999).

#### 4. *Opportunism in the Creation of Legislative History*

A final structural issue is the possibility that legislative history will be generated for opportunistic reasons, especially by key participants. Courts are prepared to rely on legislative history as an aid to construing text, and pivotal actors in the legislative process are aware of this reliance. The risk therefore arises that legislative history will include explanations or assertions about the text refashioning or deviating from the presumptively shared understanding of what that text means.<sup>240</sup> To the extent that courts have good reason to worry about such abuses, their willingness to rely on legislative history may be chilled. Accordingly, it is worth considering the likelihood that creators of legislative history in the British and American settings will engage in such manipulation.

In Britain, the concern is over manipulation by the executive branch. The executive is ultimately in charge of drafting virtually all statutory text, and it is also the central player in creating relevant legislative history. The bright-line test set forth in *Pepper* can be viewed as allowing if not inviting strategic behavior, by conferring probative value on clear ministerial statements so long as a court decides that the text itself is sufficiently ambiguous. Thus, a minister worried about the politics of a vote on some controversial issue could avoid a tough public choice by fudging the relevant text and packing the parliamentary record to slant the ambiguous provision in terms the government would prefer.<sup>241</sup> Alternatively, ministers can infuse the record with statements purporting to spell out the meaning of statutory sections, anticipating that courts will tend to defer to such statements instead of launching more rigorous examinations of the underlying text.<sup>242</sup>

There is no indication in the Law Lords' opinions applying *Pepper* that the Court has found ministers engaging in such strategic behavior.

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240. Concern over opportunism in the creation of legislative history is distinct from the concern that honestly produced legislative history will at times be unreliable. Even responsible and well-prepared participants (such as congressional committee chairs or parliamentary ministers) are not always able to deliver precise statements or complete responses in the harried atmosphere of legislative debate. Committee chairs are more likely to offer comprehensive and well-considered explanations in committee reports than in the pressured setting of an exchange on the floor. Similarly, a minister who is thoroughly briefed by her staff is less likely to miscommunicate the meaning of a textual provision than one who responds to questions from members without consulting with her department. Courts in both countries must assess the reliability of legislative history based on a range of factors, just as they do when confronted with arguments from counsel about the reliability of particular dictionary definitions or canons of construction.

241. See generally Miers, *supra* note 86, at 706.

242. See generally Styles, *supra* note 4, at 156–57.

Although the conduct may be occurring without judicial awareness, ministers will be constrained to some degree by the civil servants and parliamentary counsel who prepare advice for them regarding the meaning of statutory provisions, and also by the interest groups and media representatives that pay attention to parliamentary proceedings on important or controversial bills. If a minister in her explanation to Parliament departs from or distorts the professional advice she has received, presumptively neutral officials or attentive lobbyists might leak such conduct to interested legislators as well as the media.<sup>243</sup> It is, however, difficult at this point to gauge whether the prospect of informal oversight—especially with respect to civil servants in the minister’s own department—is having a substantial deterrent effect.

In the United States, the main concern about manipulation of legislative history stems from the plethora of record materials that actors within Congress produce.<sup>244</sup> Executive branch personnel, interested parties outside of government, and members and their legislative staffs may all be players on a particular bill, and all of them have a stake in leaving their mark on the statutory product. Lengthy committee reports, as well as floor colloquies or statements by bill managers that may be inserted unspoken into the *Congressional Record*, provide ample opportunities for strategic behavior.<sup>245</sup>

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243. See generally Miers, *supra* note 86, at 706–07.

244. In contrast to Britain’s parliamentary structure, the U.S. executive branch has no privileged role in generating legislative history as part of the congressional enactment process, although it often does make important contributions. See *supra* note 237 and accompanying text. Beginning in the Reagan era, presidential signing statements—delivered after bicameral approval and presentment—have been used with some frequency as part of an effort to influence the way a statute is interpreted by the courts. See ABA TASK FORCE REPORT, *supra* note 14, at 10. Recently, President Bush has used signing statements more extensively to declare that he will not enforce portions of the text that he is signing into law, based on his interpretation of what the enacted language means or his desire to avoid a perceived constitutional problem. This qualitative change in the use of signing statements has been met with criticism by members of Congress from both parties and by leaders in the legal profession. See, e.g., S. Judiciary Comm. Hearing, *supra* note 14; ABA TASK FORCE REPORT, *supra* note 14. The legal and policy implications of post-enactment presidential signing statements are beyond the scope of this article. For further information, see generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1245–50 (2006); Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597 (2006).

245. For an example of strategic insertion in a lengthy committee report, see Brudney, *supra* note 179, at 94–97 (criticizing as unreliable a House committee report discussion that disapproved of a Supreme Court decision construing federal pension provision; discussion occurred in a single paragraph of the 1500-page House committee report on Omnibus Budget Reconciliation Act). For an example of a strategic floor statement by a leading bill sponsor, see *Mont. Wilderness Ass’n v. U.S. Forest Service*, 655 F.2d 951, 956 n.8 (9th Cir. 1981) (criticizing as unreliable an analysis of a disputed bill section that was offered by the author of that section on Senate floor eight days after Congress had passed the bill), *cert. denied* 455 U.S. 989 (1982).

There are constraints, however, on legislative actors behaving in such a manner—notably, certain incentives within the legislative process that operate to encourage accuracy and probity, especially by committee leaders (who tend to function as bill managers) and their staffs.<sup>246</sup> In the short-term, members know they must rely on colleagues' representations at the committee stage as to what a bill means, because Congress operates heavily through its committees and members depend upon the accuracy of committee-based information in moving the legislative agenda. More generally, members as repeat players in the legislative process typically aspire in the long-term to a positive relationship with their colleagues and with the institution. The desire to be viewed as honest and fair even during fierce partisan disputes thus creates an impetus for committee leaders and floor managers not to overstate or understate a bill's general or specific objectives.<sup>247</sup>

The content and format of committee reports are also visible enough to help offset the risk of manipulation. Minority views in a report can point out a failure to present adequately or accurately the position of the majority, or highlight areas of disagreement among committee members. Such views provide notice to other legislators, their staffs, and the leadership about the need to consider controversial matters when the bill reaches the floor.<sup>248</sup>

In the end, it is difficult to compare the frequency with which British and American legislative actors opportunistically create legislative history. Risks of abuse arise from different factors, related to distinct aspects of the respective legislative processes. The main protection against such abuse is whistle-blowing and its related reputational consequences. Both lawmaking systems provide actors with ample reasons to sound an alarm against legislative commentary that overstates or undermines the agreed-upon meaning of text. These reasons are more likely to stem from political or partisan factors in the United States, and from professional or civil service considerations in Britain. Nonetheless, the whistle-blowing

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246. This and the following paragraph in text rely on positions previously presented by the author. See Brudney, *supra* note 179, at 54, 59.

247. Moreover, congressional staff are not likely to act strategically without their boss's approval given their status as agents who are typically more dedicated to their principals than are agents elsewhere in the labor market. Staff are recruited to work for committees based in part on loyalty to the chair or hiring members. Members are also sensitive to conduct that might threaten their own job security, and staff performance is often effectively monitored by the media as well as the hiring member. Finally, unlike many government personnel, congressional-committee and personal-office staff are at-will employees. See generally Brudney, *supra* note 179, at 50.

248. See *supra* note 192 and accompanying text (discussing how the presence of minority or additional views is readily apparent from the table of contents).

constraints that operate in each lawmaking system would seem to render the incidence of abuse anecdotal rather than systemic.

Underlying these constraints is a belief that the primary audience for legislative history is other members and not judges. Commentary in standing committees or on the floor can be attributed to Parliament or Congress as a whole because (or insofar as) the prominence, amplified reasoning, and persuasive context of the commentary suggests what a reasonable legislator would have had in mind when voting on the text. By relying on the principle of reasonably imputed institutional approval, both the Supreme Court and the Law Lords have implicitly endorsed that belief.<sup>249</sup>

Still, even if it is impracticable to determine whether Britain's or America's legislative history setting is more susceptible to manipulation, the three factors examined previously in this part help explain why legislative history usage is higher in the Supreme Court than in the Law Lords.<sup>250</sup> Standing committees in the American setting generate more cohesive and substantively competent indications of statutory meaning than their British counterparts. Further, because legislative bargaining and compromise are more frequent in the American context, the accompanying commentary is more likely to include reliable insights as to how the legislative process has shaped the intent underlying enacted text. Finally, the breadth of legislative history sources available in connection with congressional lawmaking offers courts more materials from which to glean what the legislature meant when enacting certain inconclusive words or phrases.

### III. PREDICTIVE AND NORMATIVE REFLECTIONS

Notwithstanding that the Law Lords use legislative history less frequently than the Supreme Court, the Lords of Appeal have now had fifteen years of exposure to parliamentary materials since *Pepper*. The initial ebb and flow of their participation, described in Part I, featured expressions of judicial frustration as well as enthusiasm, but certain

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249. See *supra* text accompanying notes 171–78.

250. My focus has been on factors directly related to the availability and reliability of legislative history. More extrinsic factors also may play a role—for instance, the relative propensity of American and British courts to prefer canons of construction to legislative history when seeking to resolve textual ambiguity or confirm textual meaning. For a discussion of how the Supreme Court uses the canons in this regard, see Brudney & Ditslear, *Canons of Construction*, *supra* note 150, at 29–36, 77–95. Consideration of the Law Lords' use of canons, and comparative analysis on this point, are deferred to a future article.

signals have begun to emerge. Recapping key recent developments, Part III.A predicts that the Law Lords are likely to build on the foundation of *Pepper* and may well expand upon their current patterns of use. Assuming that there will be no British retreat to the pre-1992 position, Part III.B offers preliminary normative thoughts based on comparisons of how the two high Courts currently debate and apply this interpretive resource. It proposes that the Supreme Court might wish to move beyond what has become a somewhat stilted debate between legislative history advocates and opponents by borrowing from the British approach. It also suggests that the Law Lords' early efforts to categorize different kinds of parliamentary exchanges in rule-oriented terms should yield to the more flexible ad hoc approach followed by Supreme Court Justices who make use of legislative history.

#### A. *The Next Stage of Post-Pepper Development*

Quantitative data presented earlier suggests that the Law Lords are in the process of consolidating if not augmenting a permanent role for legislative history as an interpretive asset. The proportion of Law Lords decisions in which at least one judge discusses Hansard materials was more than twice as high in 2001–2005 as in 1996–2000.<sup>251</sup> In addition, the proportion of decisions referencing White Papers or commission reports increased substantially in the 2001–2005 period.<sup>252</sup> These legislative materials were deemed admissible in court long before *Pepper*. Still, it seems plausible to regard the Law Lords' increased propensity to refer to them as part of a growing appreciation for how the intentions underlying enacted text can be identified and applied based on historical evidence as well as linguistic analysis.

Perhaps more revealing than aggregate trends are two recent decisions in which the Law Lords stretched their initial rule by setting forth further grounds for relying on Hansard. Although *Pepper's* three-part test credited only explanatory statements made by a minister or other prominent bill supporter,<sup>253</sup> Lord Bingham's leading speech in the 2005 case of *Jackson*

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251. See Table One, *supra* text accompanying note 157. This latest five-year average, comprising roughly one-seventh of the Court's decision docket, includes many non-controversial uses of Hansard—addressing agency policy that is under judicial review or the background mischief at which a statute is aimed. But there are also a substantial number of judicial opinions using parliamentary materials for the more controversial primary objective established in *Pepper*—to help determine the meaning of text that is ambiguous or obscure. See *supra* notes 126–28 and accompanying text.

252. See *supra* note 170 and accompanying text.

253. See *Pepper v. Hart*, [1993] 1 All E.R. 42, 69 (H.L. 1992) (U.K.) (discussed *supra* notes 64–



*v. Attorney General* relied on the Hansard-recorded history of approved and defeated amendments to illuminate the meaning of text.<sup>254</sup> Lord Bingham and his colleagues understood that he was not consulting Hansard materials strictly as authorized under *Pepper*, because in their view the text was sufficiently clear without such consultation.<sup>255</sup> Lord Bingham's reliance on drafting history during the legislative process—reviewed and analyzed through reference to Hansard—represents a notable, even if unacknowledged, extension of the court's earlier approach.

Similarly expansive is the Court's more self-conscious valuing of Hansard for confirmatory purposes in the 2006 case of *Harding v. Wealands*.<sup>256</sup> Although *Pepper* permitted the use of ministerial statements only if statutory text was ambiguous or obscure, Lord Hoffmann and Lord Rodger each relied on a parliamentary statement by the Lord Chancellor—offered to defuse a possible amendment—in order to strengthen their reading of language they regarded in any event as neither ambiguous nor obscure.<sup>257</sup> Lord Carswell, implicitly recognizing this enlargement of *Pepper*'s conceptual domain, declared that ministerial statements may be most valuable in practice to confirm that the text means what it seems to say.<sup>258</sup>

The conclusion that the Court may invoke Hansard for such supportive or reinforcing purposes is noteworthy because it brings the legitimization of legislative history use more in line with decades of somewhat covert judicial practice—from Lord Denning's 1979 confession that he often peeked at Hansard (presumably to see if he had missed anything)<sup>259</sup> to recent extrajudicial statements that the Law Lords look to Hansard (presumably for reassurance) far more often than they actually cite to the

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66 and accompanying text).

254. See *Jackson v. Att'y Gen.* [2005] UKHL 56, [2005] 4 All E.R. 1253, 1263–64, 1268 (U.K.).

255. See *id.* at 1271 (Bingham, L.J.), 1276–77 (Nicholls, L.J.), 1285 (Steyn, L.J.). The Hansard-related reasoning in these three opinions is discussed *supra* notes 133–40 and accompanying text. Lord Nicholls announced his view that ministerial statements were valuable to confirm the apparent meaning of text, setting forth a position subsequently endorsed by Lords Hoffmann, Rodger, and Carswell. See *infra* text accompanying notes 257–59.

256. See *Harding v. Wealands* [2006] UKHL 32, [2006] 4 All E.R. 1 (U.K.).

257. See *id.* at 12–13 (Hoffmann, L.J.), 23 (Rodger, L.J.).

258. See *id.* at 25–26 (Carswell, L.J.). The Hansard-related reasoning in the three *Harding* opinions is discussed *supra* notes 142–45 and accompanying text. The Law Lords had ignored the first of the three *Pepper* factors (that the text must be ambiguous or obscure) in a number of early decisions, see *supra* note 86 and accompanying text, but they had not previously embraced in such open and deliberative terms the legitimacy of using Hansard for confirmatory purposes.

259. See *supra* note 34 and accompanying text.

parliamentary record.<sup>260</sup> This use of legislative history to confirm plain meaning also brings British justifications more in line with our own.<sup>261</sup> Ironically, legislative history reliance for confirmatory purposes may be on the decline in the Supreme Court, as Justices otherwise comfortable with such uses decide, even if subconsciously, not to risk losing the allegiance of Justice Scalia or Justice Thomas by invoking the resource when it performs a supportive rather than essential function.<sup>262</sup>

The quantitative and doctrinal evidence highlighted here does not mean that the Law Lords will now proceed to expand steadily their use of Hansard. The fifteen year period since the *Pepper* decision contrasts with U.S. experience of 115 years since the Supreme Court's decision in *Holy Trinity Church*,<sup>263</sup> the case that in retrospect is viewed as ushering in our modern legislative history era.<sup>264</sup> It was not until several decades after the *Holy Trinity Church* decision that judicial reliance on legislative history became a relatively consistent practice.<sup>265</sup> British judges and academics continue to express some second thoughts about the *Pepper* rule and its consequences, and the Law Lords may well endure a period of uneven development with respect to Hansard references for the near future.

Nonetheless, the Law Lords since 1992 have come to rely on legislative history for a range of theoretical reasons that are familiar to American judges and legal academics. As evidenced in *Pepper*,

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260. See *supra* note 56 and accompanying text (discussing Lord Browne-Wilkinson's observation in *Pepper* that many distinguished judges acknowledged they already were looking at Hansard to discern the intention of Parliament).

261. See, e.g., *Stat. Interp. Hrg.*, *supra* note 184, at 5–6, 14–15 (statement of Chief Judge Patricia Wald) (reviewing the Court's decisions from the 1989 term that use legislative history to confirm apparent textual meaning); Stephanie Wald, *The Use of Legislative History in Statutory Interpretation Cases in the 1992 U.S. Supreme Court Term: Scalia Rails but Legislative History Remains on Track*, 23 SW. U. L. REV. 47, 50–53 (1993) (analyzing five decisions from the 1992 term that used legislative history to support or confirm a conclusion reached after determining that the text was not ambiguous).

262. See Brudney & Ditslear, *supra* note 8, at 222–24 (reporting and discussing their finding that three Justices who served for substantial periods before and after Justice Scalia's arrival in 1986 relied on legislative history significantly less often in their majority opinions written since 1986); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 365 (1994) (attributing majority decline in legislative history use to realities of building majority coalitions among Justices in the face of an uncompromising stance by Justices Scalia and Thomas).

263. *Rector of Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

264. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION* 680–81 (3d ed. 2002). For two comprehensive and thoughtful yet conflicting analyses of *Holy Trinity Church*, compare Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000) (supporting the Court's decision), with Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998) (doubting the wisdom of the Court's approach).

265. See generally Eskridge, *supra* note 17, at 392; Frankfurter, *supra* note 1, at 542–43.

parliamentary debates are on occasion important in traditional rule-of-law terms to help resolve the meaning of ambiguous text. As demonstrated in *Jackson* and *Harding*, both drafting history and ministerial exchanges may be valuable from an intentionalist standpoint to reinforce or confirm that the apparent meaning of certain statutory words or phrases is also the meaning that members of Parliament most probably had in mind. Finally, as indicated in a series of decisions,<sup>266</sup> the parliamentary record is relevant in a purposivist context for describing certain background policy rationales that help inform the interpretive enterprise. In short, the Law Lords appear to be broadening their insights as to how referring to Hansard sheds light on the existence of legislative intent and also helps clarify the context in which Parliament chose to enact certain language as statutory text.<sup>267</sup>

### *B. Possible Lessons from Comparative Experience*

It seems likely that legislative history references will remain a feature of statutory interpretation in British courts even as reservations continue to be expressed. With that prospect in mind, I offer some preliminary thoughts on what the Supreme Court and Law Lords might learn from one another in terms of how each currently approaches the use of legislative history.

#### *1. Judicial Debate Between Advocates and Skeptics—A Lesson for the Supreme Court?*

When the Law Lords in *Pepper* abandoned prior precedent and authorized consideration of parliamentary proceedings, they made clear that their new interpretive approach would require judges to assess just how helpful Hansard might be on a case-by-case basis. Although the legislative history at issue in *Pepper* was deemed highly persuasive by the majority,<sup>268</sup> Lord Browne-Wilkinson repeatedly observed that as a general proposition, parliamentary materials contain simply an *indication* of the mischief at which a statute was aimed or the cure that Parliament intended to effect through the use of certain words.<sup>269</sup> The opinions in *Pepper* regarded Hansard as one among many aids to the construction of

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266. See, e.g., cases identified *supra* note 127 and accompanying text.

267. Cf. Chomsky, *supra* note 264, at 951–52 (suggesting reasons why American judges should consult legislative history based on lessons from *Holy Trinity Church*).

268. See *supra* text accompanying notes 45–48 and 70–73 (recounting how the majority shifted from pro-government to pro-taxpayer outcome largely due to legislative history).

269. See *Pepper v. Hart*, [1993] 1 All E.R. 42, 64, 67 (H.L. 1992) (U.K.).

ambiguous text—one that can assist the court to varying degrees depending on the factual circumstances.<sup>270</sup> In subsequent decisions, the strongest advocates for invoking legislative history have reiterated that even when *Pepper*'s three-part test for admissibility was satisfied, a court still must assign weight to the ministerial statements in light of all relevant considerations.<sup>271</sup>

Legislative history skeptics on the highest Court have effectively adopted the same basic approach in a post-*Pepper* world. Admissibility of Hansard as a judicial aid is settled, and the primary issues that trigger debate are whether courts should accord weight to parliamentary proceedings in varying contexts. Thus for Lord Steyn—the leading judicial critic of *Pepper*—Hansard is potentially valuable to courts in order to estop the executive from abandoning its prior representations in Parliament as to the meaning of particular words or phrases in text.<sup>272</sup> Just how valuable Hansard is for this purpose will vary depending on the circumstances in which an estoppel argument arises.<sup>273</sup>

Similarly, Lord Steyn and other legislative history skeptics recognize that Hansard may be of assistance in identifying the mischief at which a textual provision is aimed, and that such a role will at times shed light on the meaning of the text under review.<sup>274</sup> Judges with reservations about certain uses of legislative history also are prepared—in suitable

270. See *id.* at 69 (Browne-Wilkinson, L.J.), 51 (Griffiths, L.J.), 52 (Oliver of Aylmerton, L.J.). Professor Vogenauer persuasively argues that the opinions in *Pepper* accord probative but scarcely binding weight to Hansard, preserving for the courts the ultimate constitutional authority to determine the meaning of statutory text. See Vogenauer, *supra* note 4, at 661–63.

271. Lord Nicholls in his *Ex parte Spath Holme* opinion observed that to say parliamentary materials qualify as an external aid means simply that such materials “are a factor the court will take into account” along with other interpretive resources that may assist in construing ambiguous or obscure text. *Regina v. Sec’y of State for Env’t, Transp. & Regions ex parte Spath Holme Ltd.* [2001] 1 All E.R. 195, 218 (H.L. 2000) (U.K.) (emphasis added); *id.* at 223 (Cooke, L.J.) (stating that courts “can in the end derive real help from Hansard, even if it is not necessarily decisive help” (emphasis added)); see also *Harding v. Wealands* [2006] UKHL 32, [2006] 4 All E.R. 1, 25 (U.K.) (Carswell, L.J.) (opining that references to Hansard as a “confirmatory aid” will be helpful on some occasions but not on others).

272. See *McDonnell v. Congregation of Christian Bros. Trs.* [2003] UKHL 63, [2004] 1 All E.R. 641, 655–56 (U.K.); Steyn, *supra* note 5, at 67, 70.

273. Compare, e.g., *Ex parte Spath Holme*, [2001] 1 All E.R. at 227 (Hope, L.J.) (contending that estoppel rationale was properly invoked in *Pepper*), with *Regina v. A.* [2001] UKHL 25, [2001] 3 All E.R. 1, 28 (U.K.) (Hope, L.J.) (concluding that estoppel rationale carries no persuasive weight under the facts of the case).

274. See, e.g., *Lesotho Highlands Dev. Auth. v. Impreglio SpA* [2005] UKHL 43, [2005] 3 All E.R. 789, 798–99 (U.K.) (Steyn, L.J.); *Regina v. Soneji* [2005] UKHL 49, [2005] 4 All E.R. 321, 324–25 (U.K.) (Steyn, L.J.); *Regina v. A.*, [2001] 3 All E.R. at 47–48 (Hutton, L.J.).

circumstances—to rely on the record of a statute’s drafting history to aid in understanding statutory language.<sup>275</sup>

The debate within the Law Lords between legislative history advocates and skeptics thus goes to weight more than admissibility. Some judges contend that courts should never use Hansard to help identify parliamentary intent as to the meaning of enacted words or phrases, but even those judges agree that Hansard can be valuable in a range of other interpretive settings. Disagreements since *Pepper* suggest that the Law Lords are searching for an appropriate balance in terms of how often to use legislative history, not whether it should be relied on at all. These disagreements, informed by concern over the possible costs that would be imposed on parties and their counsel who comb through Hansard and on lower court judges who must evaluate the results of such searches, have produced a lively and at times nuanced set of exchanges.

By contrast, recent debate on the Supreme Court between legislative history advocates and skeptics has generally been cast in an all-or-nothing form. Justice Scalia has shaped the terms of this debate, insisting that judges ought never consult, much less rely on, legislative history when construing statutes.<sup>276</sup> In support of his position, Justice Scalia has advanced constitutional and practical arguments for why courts should eschew all reference to legislative history.<sup>277</sup> He has been joined in this blanket-rule approach on some occasions by Justice Thomas, but after twenty years by no one else on the Court.<sup>278</sup> Several Justices have responded to the Scalia critique, defending or justifying the basic utility of legislative history, albeit with relatively spare arguments.<sup>279</sup> Early returns

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275. See *Jackson v. Att’y Gen.* [2005] UKHL 56, [2005] 4 All E.R. 1253, 1263–64 (U.K.) (Bingham, L.J.).

276. See, e.g., *Zedner v. United States*, 126 S. Ct. 1976, 1990–91 (2006) (Scalia, J., concurring); *Conroy v. Aniskoff*, 507 U.S. 511, 518–28 (1993) (Scalia, J., concurring); SCALIA, *supra* note 159, at 31–37.

277. For constitutional arguments, see, for example, *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 621 (1991) (Scalia, J., concurring) (invoking separation of powers considerations); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring) (invoking legislative supremacy considerations). For practical arguments, see, for example, *Conroy*, 507 U.S. at 519 (invoking litigation costs to parties); *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring) (invoking likelihood of opportunistic behavior in creation of legislative history).

278. See, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 219 (1994) (Scalia & Thomas, JJ., concurring); *Reves v. Ernst & Young*, 507 U.S. 170, 172 n.1 (1993) (reflecting the views of Scalia and Thomas, JJ.). Justice Scalia is supported by certain members of the academic community who share his belief that legislative history should never be consulted. See, e.g., Manning, *supra* note 161; Nagle, *supra* note 161; Vermeule, *supra* note 161.

279. For examples of abbreviated defenses, see, for example, *Conroy*, 507 U.S. at 518 n.12 (Stevens, J.); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 516 n.8 (1992) (Souter, J.);

from the Roberts Court suggest there will be no new converts to the Scalia position; indeed, Justice Alito, in one of his first majority opinions, drew a sharp rebuke for invoking legislative history to help confirm the Court's construction of language in a criminal statute.<sup>280</sup>

Justice Scalia's deeply skeptical views were manifested most recently in *Hamdan v. Rumsfeld*.<sup>281</sup> An important issue in that case was whether the 2005 Detainee Treatment Act (DTA) deprived the federal courts of jurisdiction over a habeas corpus petition (pending at the time of DTA enactment) that was brought by an alien who had been detained by the Department of Defense at an American prison in Guantanamo Bay, Cuba.<sup>282</sup>

Justice Stevens, writing for the majority, concluded that both the DTA text and its legislative history reflected Congress's determination *not* to remove habeas jurisdiction for cases pending at the time of enactment.<sup>283</sup> In his reliance on the legislative record, Justice Stevens invoked the Act's drafting history, noting that Congress had rejected earlier proposed versions of the statute that would have removed the jurisdiction at issue.<sup>284</sup> Justice Stevens also pointed to the floor statement of a leading Senate cosponsor, delivered during debate preceding the Senate vote, while discounting contrary statements by two other Senate cosponsors because they had been inserted into the *Congressional Record* after the Senate debate and vote had taken place.<sup>285</sup>

Justice Scalia, in dissent, took aim at both prongs of the majority's legislative history position. He insisted that the timing of floor statements by Senate sponsors was entirely irrelevant because such statements by individual members lacked any probative significance.<sup>286</sup> Similarly,

*Mortier*, 501 U.S. at 611–12 n.4 (1991) (White, J.). For a more detailed justification, see *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276–78 (1996) (Stevens, J., concurring).

280. See *Zedner*, 126 S. Ct. at 1985–86 (Alito, J.) (relying on Senate and House committee reports); *id.* at 1990–91 (Scalia, J., concurring) (criticizing the majority's reliance on legislative history as predicated on a "naïve belief" in the imputation of collective intent from a committee report statement, and as especially "ill-advised" in this case); see also *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 318–19 (2005) (statement by then-nominee Roberts that he had "quoted and looked to legislative history in the past [as an appellate judge] to help determine the meaning of ambiguous terms, and [that he] would expect to follow the same approach on the Supreme Court").

281. 126 S. Ct. 2749, 2815–17 (2006) (Scalia, J., dissenting).

282. See *id.* at 2759, 2762–69 (majority opinion).

283. See *id.* at 2765–69 (setting forth majority conclusions based on text and legislative history).

284. See *id.* at 2766.

285. See *id.* at 2766, 2767 n.10.

286. *Id.* at 2815–16.

Justice Scalia reaffirmed his view that there was no reason ever to rely on the drafting history accompanying a bill's enactment.<sup>287</sup>

Supreme Court Justices who are prepared to rely on legislative history in at least some circumstances regularly attach weight to distinctions such as those between pre-enactment and post-enactment statements, or between live floor debate and inserted remarks; they also regularly regard drafting history as probative under certain conditions. Even British judges who have voiced serious reservations about legislative history have accorded weight in some circumstances both to live parliamentary exchanges and to drafting history.<sup>288</sup> Both British and American judges do so because they subscribe implicitly if not expressly to the principle of reasonably imputed institutional approval—that the value to be accorded to legislative history in a given case is linked to whether congressional or parliamentary materials can persuasively be deemed to have been noticed, understood, and endorsed by a presumptively reasonable legislator.<sup>289</sup> This is not the place to address the relative merits of conceptual and practical disagreements between Justice Scalia and his colleagues regarding the status of legislative history. What matters for present purposes is that because of Justice Scalia's committed opposition to any form of legislative history usage, conceptual disagreements among the Justices are almost inevitably cast in terms of admissibility rather than weight.<sup>290</sup>

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287. *See id.* at 2817.

288. *See, e.g.,* Ghaidan v. Mendoza [2004] UKHL 30, [2004] 3 All E.R. 426–27 (U.K.) (Steyn, L.J.) (crediting live parliamentary exchange); Jackson v. Att'y Gen. [2005] UKHL 56, [2005] 4 All E.R. 1253, 1263–64, 1268 (U.K.) (Bingham, L.J.) (crediting drafting history).

289. *See supra* text accompanying notes 173–76 (discussing this principle as evidenced in writings of Justices Stevens, Breyer, and Souter). *See generally* Brudney, *supra* note 179, at 75–80.

290. Justice Scalia does on occasion engage legislative history advocates on their own terms, arguing that the legislative history evidence is contextually unpersuasive even indulging the assumption that it is admissible. *See, e.g., Hamdan*, 126 S. Ct. at 2816 (arguing that the majority exaggerates the one-sidedness of pre-enactment floor debate); *Babbitt v. Sweet Home*, 515 U.S. 687, 726–30 (1995) (Scalia, J., dissenting) (arguing that the majority overvalues committee report evidence while undervaluing certain floor statement evidence). Moreover, Justice Scalia has carved out at least one exception to his blanket rule: courts may consult legislative history in the rare instances when doing so would enable them to avoid an absurd result apparently dictated by the text. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring). Nonetheless, Justice Scalia has expressed his fundamental objections to any use of legislative history with conviction and perseverance, and his position has become the singular focus for debate and interchange among the Justices as to the methodological value of this resource.

Justice Scalia's skepticism regarding legislative history is an integral part of his larger jurisprudential campaign to restrict judicial choice or discretion in the interpretation of statutes. *See generally* SCALIA, *supra* note 159; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); *see also* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 370–71 (2005). The view that use of legislative history promotes judicial discretion and that textualism confines such discretion is seriously contested, but is beyond the scope of this article.

A less noticed side effect of this conceptual debate has been the relatively impoverished nature of the Supreme Court's dialogue on how to approach legislative history as an interpretive asset. While members of the Law Lords grapple with different ways in which Hansard might or might not assist in illuminating the meaning of enacted text, members of the Supreme Court have focused on the threshold issue of admissibility. One could imagine a more enlightening set of judicial exchanges addressed to the relative utility of legislative history in diverse settings. There would be ample scope for such exchanges, given that the sources of legislative history generated by Congress are at once richer and potentially more perplexing than what is produced within Parliament.

For instance, should legislative history be regarded as presumptively more valuable to help resolve textual ambiguities that stem from lack of foresight rather than lack of political consensus? Is legislative history accompanying omnibus bills generally less suitable for judicial use because congressional deals on such a grand scale are simply indecipherable? Should legislative history in certain subject areas be presumed to have less weight where the law is administered primarily by a federal agency rather than private parties, or where the statutory text tends to be detailed and technical rather than open-ended and more public interest oriented? There are no ready answers to such questions, and legal scholars are contributing to the conversation.<sup>291</sup> But in light of the current Court's fault line, focused on the threshold admissibility of legislative history, the Justices have played little role in exploring how or whether legislative history should be valued differently in varying circumstances—an exploration that is thriving among the Law Lords.

## 2. *Applying Legislative History—A Lesson for the Law Lords?*

It is still early in Britain's post-*Pepper* period, but the Law Lords have created a series of putative bright-line classifications to decide how and when courts can invoke legislative history as an interpretive asset. There is some question as to whether these distinctions among multiple categories can withstand prolonged scrutiny; for now, the Court's approach seems in

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291. See, e.g., Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, ISSUES IN LEGAL SCHOLARSHIP, Nov. 2002, at 6–15, available at <http://www.bepress.com/ils/iss3/art1>; Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677 (1996); Merrill, *supra* note 262; William N. Eskridge, Jr., *Book Review: No Frills Textualism*, 119 HARV. L. REV. 2041, 2074–75 (2006).



part an effort to impose order in a new and unfamiliar area of responsibility.

As described more generally in Part I.C above, the Law Lords have recognized two categories of *Hansard* usage as unproblematic and as having the potential for general application. First, a court may consult *Hansard* to identify the mischief at which a law is aimed and then use the identified mischief-avoidance purpose to assist in construing the statutory text. Thus, for instance, the Law Lords invoked a ministerial discussion of the philosophy behind the 1996 Arbitration Act when deciding that an arbitrator's error of law, standing alone, could not be challenged in Court as "the tribunal exceed[ing] its powers" under the statute.<sup>292</sup>

The second broadly applicable, unproblematic category draws on legislative history materials to assist the courts in understanding the contours of the government's policy when reviewing agency decisions for basic fairness or rationality. In this context, the Law Lords have relied on ministerial explanations in Parliament to help understand government sentencing procedures that allegedly abridged the right to a fair tribunal<sup>293</sup> and government policies for compensating miscarriages of justice when those policies were alleged to be inadequate.<sup>294</sup>

Apart from these two categories, described as "innocuous" in a leading 2003 decision,<sup>295</sup> some Law Lords have identified a third assertedly noncontroversial use of *Hansard*, premised on a rationale of estoppel against the government. This category is meant to prohibit the government from abandoning in court a clear representation previously made in Parliament with respect to the meaning of certain statutory words or phrases, or with regard to a government commitment not to exercise its power in a given situation.<sup>296</sup> The estoppel rationale for limiting *Hansard*

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292. *See Lesotho Highlands Dev. Auth. v. Impreglio SpA* [2005] UKHL 43, [2005] 3 All E.R. 789, 798–801 (U.K.) (Steyn, L.J.); *see also Regina v. Soneji* [2005] UKHL 49, [2005] 4 All E.R. 321, 324–25 (U.K.) (Steyn, L.J.) (relying on parliamentary statements that accompanied the 1995 Proceeds of Crime Act, identifying a need to prevent confiscation orders from being quashed "merely because some procedural error has taken place," in its decision to reverse an appellate court's quashing of a confiscation order simply on timeliness grounds).

293. *See Anderson v. Sec'y of State for the Home Dept.* [2002] UKHL 46, [2002] 4 All E.R. 1089, 1093, 1095 (U.K.) (Bingham, L.J.), 1104–05 (Steyn, L.J.).

294. *See Mullen v. Sec'y of State for Home Dept.* [2004] UKHL 18, [2004] 3 All E.R. 65, 72 (U.K.) (Bingham, L.J.), 79–82 (Steyn, L.J.).

295. *Wilson v. First County Trust Ltd.* [2003] UKHL 40, [2003] 4 All E.R. 97, 117 (U.K.) (Nicholls, L.J.).

296. *See id.* at 130–31 (Lord Hope) (discussing estoppel rationale with respect to meaning of certain words); *Regina v. Sec'y of State for Env't Transp. & Regions ex parte Spath Holme Ltd.*, [2001] 1 All E.R. 195, 212 (H.L. 2000) (U.K.) (Lord Bingham) (discussing estoppel rationale with respect to scope of government powers).

use has recently been questioned on conceptual grounds,<sup>297</sup> but in any event this category can be expected to have a very narrow application.<sup>298</sup>

In addition to certain agreed-upon roles for legislative history, the Law Lords have identified several distinct areas as contentious. A fourth category of Hansard usage that has become controversial is the one at the core of the *Pepper* decision. Lord Browne-Wilkinson's determination—that courts may and at times should rely on statements during parliamentary debates as an aid to the construction of enacted words or phrases—continues to be endorsed by many members of the Law Lords but has been renounced by some others.<sup>299</sup> The Law Lords also have declared Hansard references off limits in a fifth and sixth setting regarded as suspect. In *Ex parte Spath Holme*, the court announced that (subject to the improbable government estoppel exception) ministerial statements addressed to the scope of a government's statutory powers were inadmissible in court.<sup>300</sup> In *Wilson*, the Law Lords further concluded that in reviewing domestic legislation challenged as incompatible with European Convention law under the 1998 Human Rights Act, courts could not consult Hansard to aid in resolving issues of compatibility.<sup>301</sup>

The distinctions among these various categories may, at a minimum, require some adjustment as new controversies arise. For example, the *Ex parte Spath Holme* decision involved a challenge to the government's exercise of its statutory authority to “provide for . . . restricting or preventing increases of rent.”<sup>302</sup> Assuming *arguendo* that a minister's parliamentary statement clearly set forth the justification behind the creation of this power to “restrict[] or prevent[] increases,” it is not obvious why such legislative history should be excluded as bearing on the scope of government power, rather than taken seriously as relating to the

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297. See Sales, *supra* note 147, at 589–90 (contending that insofar as a statute is enacted to bind citizens as well as the government, it makes little sense to conclude—under an estoppel rationale—that the text should have one meaning when applied to the government and another meaning when applied to private citizens).

298. The Law Lords have described the prospect of a minister assuring Parliament that certain discretionary powers would never be used as “improbable[]” and “most unlikely.” *Ex parte Spath Holme*, [2001] 1 All E.R. at 212. The Court's discussion of estoppel in the meaning-of-words context has focused almost exclusively on whether this rationale confines the scope of the holding in *Pepper* itself. See, e.g., *McDonnell v. Congregation of Christian Bros. Trs.* [2003] UKHL 63, [2004] 1 All E.R. 641, 655–56 (U.K.) (Steyn, L.J.); *Wilson*, [2003] 4 All E.R. at 130–31 (Hope, L.J.).

299. See *supra* text accompanying notes 129–47.

300. See *Ex parte Spath Holme*, discussed *supra* text accompanying notes 117–18.

301. See *Wilson*, discussed *supra* text accompanying notes 121–25.

302. *Ex parte Spath Holme*, [2001] 1 All E.R. at 200 (quoting Landlord and Tenant Act, 1985, C.70, § 31(1) (Eng. & Wales)).

meaning of an enacted phrase.<sup>303</sup> Similarly, when considering the proportionality of a statutory provision under the Human Rights Act, it is puzzling that the Court may find Hansard materials inadmissible to help determine matters of compatibility, yet useful because related to the background mischief at which the provision is aimed.<sup>304</sup>

Whether the particular lines drawn by the Law Lords when applying legislative history are sustainable in practical and conceptual terms is beyond the scope of this Article.<sup>305</sup> For present purposes, what stands out is that the judges on Britain's highest court have created as many as six presumptively strict categories in the course of determining that judicial reliance on Hansard may in different settings be innocuously helpful, controversial yet beneficial, or troubling and unwelcome. As for why the Court has adopted this somewhat rigid approach, it may be that such line drawing is regarded by the judges, even if subconsciously, as the best way of giving shape to a dramatic new set of responsibilities.

Rules are often favored as legal directives because they are perceived as providing a level of certainty or predictability.<sup>306</sup> The Law Lords may well regard their efforts at classification as furnishing important guidance to lower courts that have entered an interpretive domain deemed off limits for centuries. Such guidance may be especially apt because early evidence indicates fairly substantial Hansard usage by lower courts.<sup>307</sup> Further, such a rule-based approach may be part of a judicial effort to channel, if not confine, attorney appetites for this new asset.<sup>308</sup> Attorneys' interest in parliamentary materials creates additional burdens for judges, because the required submission of Hansard extracts accompanied by a written summary of argument imposes an extra obligation on courts that rely heavily on oral presentations and that lack law clerks to aid in the review

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303. Compare *id.* at 212 (Bingham, L.J.) (regarding Hansard as inadmissible), with *id.* at 215, 218–19 (Nicholls, L.J.) (regarding Hansard as admissible but not persuasive in this instance), and *id.* at 219–23 (Cooke, L.J.) (regarding Hansard as admissible and helpful in this instance).

304. See *Williamson v. Sec'y of State for Educ. & Employment* [2005] UKHL 15, [2005] 2 All E.R. 1, 10, 16–17 (U.K.) (Nicholls, L.J.) (recognizing that proportionality of provision prohibiting parent-supported corporal punishment by teachers at a religious school “is to be judged objectively and not by the quality of the reasons advanced . . . in the course of parliamentary debate,” while also noting with approval that the debate featured consideration of whether to override parental choice and specifically discussed the Convention rights of parents).

305. See generally Bennion, *supra* note 106; Sales, *supra* note 147; Vogenauer, *supra* note 4.

306. See generally Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62 (1992).

307. See sources cited *supra* note 146.

308. In this regard, see also *supra* text accompanying notes 67–69 (setting forth procedural hurdles to use of Hansard by counsel, including sanctions for noncompliance).

and analysis of such pre-hearing submissions.<sup>309</sup> Finally, the Law Lords themselves seem somewhat wary of what they have wrought,<sup>310</sup> and a series of ostensibly sharp lines may lend structure to what is for them a rather open-ended enterprise.

In contrast to the Law Lords' sudden exposure to Hansard, the Supreme Court has been invoking committee reports, floor statements, and drafting history to assist in construing statutes on a fairly regular basis for more than half a century.<sup>311</sup> Over this period, the Court has not articulated bright-line rules or even a terribly structured approach for legislative history usage. Instead, the Justices have applied a rather amorphous standard based on reliability—an approach that tends to take account of the totality of circumstances in a given case.

To be sure, there is a broadly recognized hierarchy of reliable legislative history sources. Conference reports, standing committee reports, and explanatory floor statements by bill sponsors or managers are clustered near the top,<sup>312</sup> while legislative inaction, statements by nonlegislative drafters, and post-enactment history are arrayed close to the bottom.<sup>313</sup> Nonetheless, the Supreme Court often finds committee report evidence to be unhelpful or legislative inaction to be highly probative based on the factors at hand, and the Justices do not appear especially dedicated to assigning any given source a predictable place within the hierarchy.<sup>314</sup> In addition, legislative history sources of all kinds are often regarded as more valuable or useful to help address the meaning of

309. See *supra* note 69 and accompanying text (discussing special pre-hearing submission requirements for use of Hansard). See generally HOUSE OF LORDS, PRACTICE DIRECTIONS AND STANDING ORDERS APPLICABLE TO CIVIL APPEALS (2007), at 21–25, 30, available at [www.parliament.the-stationery-office.co.uk/pa/ld199697/ldinfo/ld08judg/bluebook/blue.pdf](http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldinfo/ld08judg/bluebook/blue.pdf) (describing components of the skeletal argument to be submitted by counsel in advance of hearing, and noting that oral arguments may last more than 17.5 hours (four sitting days)).

310. See, e.g., *Jackson v. Att’y Gen.* [2005] UKHL 56, [2005] 4 All E.R. 1253, 1285 (U.K.) (Steyn, L.J.); *Robinson v. Sec’y of State* [2002] UKHL 32, [2002] N. Ir. L.R. 390, 405 (U.K.) (Hoffmann, L.J.).

311. See sources cited *supra* note 17.

312. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 191, at 311–12; KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 173 (1999).

313. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 191, at 315–17; GREENAWALT, *supra* note 312, at 174–75.

314. For example, on the issue of whether courts should rely on the *silence* of legislative history as evidence that a statutory amendment effecting a potentially substantial change in policy has not done so, compare *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (stating that “[i]n ascertaining the meaning of a statute, a court *cannot*, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark” (emphasis added)), with *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (relying on the legislative history’s silence as probative that Congress lacked an intent to make a major policy change, likening “Congress’s silence in this regard . . . to the dog that did not bark”). See generally Siegel, *supra* note 290, at 385–89.

inconclusive text than they are to confirm, question, or supplant the meaning of text that is clear.<sup>315</sup> Yet the Court continues to consult legislative history even when the text itself is unambiguous,<sup>316</sup> and it justifies this practice in the face of other decisions that seem bent on prohibiting it.<sup>317</sup>

The Supreme Court's approach when applying legislative history is open to criticism for being overly vague, and the concept of reliability is not easy to pin down. Professors Eskridge, Frickey, and Garrett have referred generally to whether a given committee report or floor manager's statement constitutes "reliable evidence of consensus within the legislature that can be routinely discerned by interpreters,"<sup>318</sup> and I discussed earlier whether legislative record evidence "can persuasively be deemed to have been noticed, understood, and endorsed by a presumptively reasonable legislator."<sup>319</sup> Although each of these formulations leaves ample—some would say excessive—room for the exercise of judicial discretion, there are certain advantages to the use of such an interpretive approach.

One benefit is that the reliability standard is flexible enough for judges to adapt its application as relevant factors change over time.<sup>320</sup> For example, because of advances in technology such as electronic voting and live telecasts of floor proceedings, members spend considerably less time than they used to on the floor of the House or Senate, either debating and listening to one another or discussing privately how they expect to vote.<sup>321</sup> It seems reasonable to infer from this change that floor statements, even those delivered by bill managers, should less readily be deemed to have been noticed and endorsed by presumptively reasonable legislators when those legislators' presence on the floor has become principally associated

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315. See generally Breyer, *supra* note 184, at 848.

316. See, e.g., *Zedner v. United States*, 126 S. Ct. 1976, 1985–86 (2006); *Gen. Dynamics Land Sys. Inc. v. Cline*, 540 U.S. 581, 586–89 (2004).

317. See, e.g., *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citation omitted). See generally Siegel, *supra* note 290, at 386.

318. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 191, at 304 (emphasis on "reliable" omitted).

319. See *supra* text accompanying note 289.

320. See generally Sullivan, *supra* note 306, at 66.

321. See, e.g., JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* 151–53 (1994); A SECOND REPORT OF THE RENEWING CONGRESS PROJECT 57 (The American Enterprise Inst. & The Brookings Inst. 1993); George E. Connor & Bruce I. Oppenheimer, *Deliberation: An Untimed Value in a Timed Game*, in CONGRESS RECONSIDERED 315, 324–25 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 5th ed. 1993). Members also come to the chamber floor less often due to other factors, such as the need to spend considerable time raising money for re-election campaigns.

with the ringing of a bell to announce a timed vote.<sup>322</sup> There is some evidence that in the aggregate, the Court's reliance on floor statements as a proportion of its overall legislative history reliance has declined substantially since the late 1980s.<sup>323</sup> This decline warrants further investigation, but it seems plausible that the Justices (and the litigants who appear before them) may be adjusting their sense of what constitutes reliable legislative history in response to changing realities of the lawmaking process.

Another possible advantage of a less rule-oriented focus is that it forces judges to acknowledge that they *are* exercising discretion when invoking some legislative history sources and not others, or relying on that history for some reasons and not others. In this regard, the Supreme Court's ad hoc approach to applying legislative history may reflect the increased sense of assurance that accompanies a more mature or settled stage of jurisprudence on this topic. The Court has been making use of legislative history for several generations, and the current Justices have been exposed in their education, if not in their experience, to various complexities of the lawmaking process.<sup>324</sup> It is therefore not surprising that those who make regular use of legislative history seem comfortable separating wheat from chaff on an individual-case basis in much the same way they do when applying other interpretive resources.<sup>325</sup>

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322. See GREENAWALT, *supra* note 312, at 175–76 (contending that because fewer members are present or paying attention to floor debates today, reliance on those floor debates to reflect collective legislative intent is less persuasive).

323. Preliminary findings are derived from the dataset of 650 Supreme Court decisions on workplace law compiled by the author. See *supra* note 150. Brudney and Ditslear have looked at the Court's reliance on different legislative history sources, measured in five-year intervals starting with 1969–73 and ending with 1999–2003. They found that reliance on House floor statements dropped from more than forty percent of all majority opinions using legislative history during the early- and mid-1980s to well below twenty percent of such cases after 1988. Reliance on Senate floor statements as a percentage of all cases relying on legislative history declined from more than fifty percent in the 1980s to roughly fifteen percent in the period since 1993. A copy of these preliminary results is on file with the author.

324. To be sure, fewer Justices today have first-hand legislative experience than was the case in the decades preceding 1970. See James J. Brudney, *Foreseeing Greatness? Measurable Performance Criteria and the Selection of Supreme Court Justices*, 32 FLA. ST. U.L. REV. 1015, 1049 (2005). Still, all have been exposed to the legislative process in college and/or law school, most have had years of experience sifting the products of that process as appellate judges, and presumably many if not all follow congressional developments and disagreements as intelligent consumers of the Washington media.

325. A proponent of legislative history in the United States might well respond that Britain's rule-based approach would do a better job of limiting the discretion available to Supreme Court Justices, and that limiting judicial choice in this area is especially desirable given the volume and diversity of legislative history sources typically available in the American context. Whether the Court's reliability standard would be enhanced if the Justices were to endorse and adhere to one or more subsidiary

Over time, British judges—educated and experienced in common-law traditions and practice—may come to adapt their initial approach to the dynamic realities of European as well as domestic events. The recent opinions in *Jackson* and *Harding* suggest an evolving awareness of how *Pepper*, read literally, may unduly confine the Court's ability to make constructive use of Hansard. Given these developments, it seems possible and perhaps desirable that the Law Lords consider a more flexible and less rule-bound approach when determining how best to make use of parliamentary materials.

### CONCLUSION

Fifteen years after *Pepper v. Hart*, the Law Lords remain in the initial stages of a fruitful debate concerning the appropriate uses of legislative history. This Article suggests that the British Court's applications and refinements of *Pepper*, when viewed from a comparative perspective, can contribute to a deeper understanding of certain interpretive challenges facing our own federal judiciary.

Both the Law Lords and the Supreme Court rely on legislative record evidence to help clarify the meaning of statutory text. Some of the judicial rhetoric in Britain reflects concern that Pandora's box has been opened, while discussion regarding recent Supreme Court practice has focused on the trend toward limiting judicial usage. Notwithstanding these perceptions, the comparative reality is that over the past decade, the Supreme Court's use of legislative history well exceeds Law Lords references to Hansard. The Article's analysis of certain factors in each country's legislative process helps account for why this substantial difference exists and is likely to remain in place for the foreseeable future.

At the same time, the Article's examination of aggregate data and doctrinal developments since 1992 suggests that the Law Lords will continue to rely on parliamentary materials and may well extend the permissible scope of Hansard references. From a comparative standpoint, it is intriguing that British legal culture, which shares the basic American approach to judicial review of statutory meaning, now finds enhanced interpretive value in the historical materials that help fuel the legislative process. By endorsing the legitimacy and utility of Hansard, the Law Lords may in effect be exerting subtle normative pressure on those who would reject legislative history altogether in the U.S. setting. In contrast to

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guidelines presumptively constraining the uses of legislative history warrants further consideration in another setting.

Britain, our legislative record features an especially informative resource—committee reports—and explanatory materials that regularly shed light on the bargains endemic to our lawmaking enterprise. Those distinctive assets would seem to argue for our becoming more attentive to the nuances of positive reliance on legislative history, rather than simply continuing to debate the merits of its wholesale exclusion.

Finally, the comparative explanations and analyses presented here should be viewed as a first step in the development of an ongoing research agenda. It is important to examine, for instance, how British lower courts have used Hansard under the rule of *Pepper*, and how they are responding to the Law Lords' recent signals in *Jackson* and *Harding*. In addition, British courts have long made use of traditional textualist resources such as dictionaries and language canons when interpreting statutes.<sup>326</sup> It would be worth exploring how the admissibility of parliamentary materials is affecting previously settled judicial practices in this regard. As legislative history becomes a more established element in Britain's approach to statutory interpretation, there will doubtless be other ways to pursue how courts in that country consider what is below the surface and yet fairly understood to be part of enacted text.

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326. See, e.g., *Mandla v. Dowell Lee*, [1983] 1 All E.R. 1062, 1065–66 (H.L. 1983) (U.K.) (invoking several dictionary definitions of contested statutory phrases); *Queens Univ. of Belfast v. Comm'r*, [2001] R. & V.R. 112, 112–13 (Lands Trib. for N. Ir. (2000)) (invoking language canon of *ejusdem generis*).